OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 10

to

The Legislative Assembly of British Columbia

SECTION 4 OF THE HIGHWAY ACT

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

June 4, 1985

The Honourable K. Walter Davidson,
Speaker of the Legislative Assembly,
Province of British Columbia,
Parliament Buildings,
Victoria, B.C.

Mr. Speaker:

I have the honour to submit herewith a report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, c.306.

This report deals with my proposed resolutions for two individual complaints and with my recommendations for reconsideration of the law with respect to the creation of public highways, as presently embodied in section 4 of the Highway Act. I have attached in the appendices to this report my correspondence with the Ministry of Transporation and Highways and other related documents.

All of which is respectfully submitted.

Yours sincerely,

Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

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TABLE OF CONTENTS

SUMMARY..... i

I. INTRODUCTION..... 1

II. THE COMPLAINTS

A. Mr. Rankin Smith..... 5
B. Mr. Thomas Farup..... 9

III. THE LAW

A. Judicial Interpretation of Section 4..... 12
B. The Law applied to the complaints..... 16

IV. SECTION 4 AND ADMINISTRATIVE FAIRNESS..... 19

V. MY RECOMMENDATIONS AND THE MINISTRY'S RESPONSE..... 23

A. Rectification of the Complaints..... 24
B. Section 4..... 26

VI. MY REPORT TO THE LIEUTENANT GOVERNOR IN COUNCIL..... 28

VII. CONCLUSION..... 31

TABLE OF APPENDICES..... 32

APPENDICES

SUMMARY

Section 4 of the Highway Act provides that ownership of any private travelled road, upon which public monies have been spent, is automatically transferred to the Crown. This report describes the application of section 4 in two complaints which were brought to my attention in 1981 -- the complaints of Mr. Smith and Mr. Farup. In both cases, the Ministry of Transportation and Highways reached a conclusion as to whether or not section 4 applied to the private road crossing my complainants' lands, and these conclusions had adverse effects on the complainants.

In Mr. Smith's case, the Ministry alleged that its local foreman had graded a road, through Mr. Smith's private property. When Mr. Smith disputed the Ministry's claim that it had graded his road, a Ministry grader arrived at his gate one day to grade the road, but Mr. Smith had been tipped off by a neighbour and turned back the grader from his property.

Whether Mr. Smith's road had ever been graded by the Ministry of Transportation and Highways is significant only because it was on this basis alone that the Ministry claimed that it now owned Mr. Smith's private road. Following its claim that his road had become a public road, the Ministry then refused to pay Mr. Smith compensation for the land (upon which the road lay) which he had lost.

Mr. Farup, on the other hand, wanted the road which provides access to his property to be declared a public road so that he would be able to subdivide his land. Mr. Farup pointed out how the Ministry of Transportation and Highways had provided culverts which were installed in the road and argued that this expenditure of public monies had the effect of making the road public -- because of section 4 of the Highway Act. The Ministry said that it did not.

Following my investigation of these complaints, I concluded that the Ministry had incorrectly applied section 4 in both cases and I made specific recommendations to rectify the injustices caused to the complainants. My recommendations have not been implemented by the Ministry and the Lieutenant Governor in Council has similarly declined to take action on them.

These complaints led to me to review section 4 in greater detail since it is truly a unique section of the law. It permits, by virtue of the fact that the Ministry has graded a private road, private property to be automatically, instantaneously and unintentionally expropriated to the Crown -- and without compensation to the owner. While the courts have done much to qualify the application of the section and hence to ameliorate its effects, section 4 continues to give rise to problems and disputes throughout British Columbia each year.

I was informed by the Ministry that 38 percent of all the public roads in British Columbia are public only to the extent that section 4 applies to them. Because section 4 roads are usually not surveyed and recorded in Land Titles Offices, there are literally hundreds of roads across private lands which can give rise to disputes about ownership. During my experience as Ombudsman, I have received dozens of complaints, similar to the two which are documented in this report, in which the uncertainty regarding ownership, which section 4 creates, has led to neighbourhood battles and disputes with government. Often the problem arises when one neighbour, thinking that he owns the road in question, blocks off the road and prevents the adjacent landowner from using it.

Following these investigations and my review of the legislation, I concluded that section 4 is unjust because of its effects on private property. I recommended that the Ministry seek to have the section phased out over a five year period, during which the Ministry would be able to survey and register in Land Titles Offices all of the existing section 4 roads which it believed necessary to serve the public interest. Neither the Ministry nor the Lieutenant Governor in Council has seen fit to implement my recommendations or to take other action to resolve this matter.

I believe that action ought to be taken. While section 4 does permit the government to acquire private land without compensation, the costs to individuals and to society as a whole are enormous. It is imperative that the law, particularly as it affects private property, be clear and its application be equitable. In my view, section 4 fails on both counts, and some remedial action is required.

I. INTRODUCTION

Knowing the status of a road which crosses or provides access to private property is of vital importance to the property owner. Many people assume that it is a straightforward matter to determine whether a road is private or public. To the layman, it seems elementary that the law would provide an easy answer to this question, enabling landowners to determine whether there is sufficient access to their property.

Unfortunately, this assumption is not true in British Columbia, because of the existence of section 4 of the Highway Act (hereinafter referred to as "section 4"). Section 4, with certain limited exceptions, deems travelled private roads to be public highways if public monies have been expended on them. (see page 13 for the full text of section 4.)

Differing interpretations of the effect of section 4 on particular roads have given rise to a number of disputes, both between neighbours and between private citizens and government (notably the Ministry of Transportation and Highways.) A number of these disputes have reached the courts, and section 4 has, therefore, been the subject of judicial interpretation.

Court actions are often costly to the participants, and legal remedies have often been unavailable to my complainants. But because of increasing demands on my office and the difficulties I have experienced in effecting change in the cases which I have investigated, I have recently found it necessary to begin referring complainants to solicitors for consideration of whether their cases warrant court action.

During the past five and a half years, I have received many complaints about the use of section 4 by the Ministry of Transporation and Highways, and I refer to some of these cases in this report. I will discuss primarily the complaints of Messrs. Smith and Farup. In both cases, the Ministry of Transportation and Highways has taken a position on whether roads traversing or giving access to the complainants' property are public highways within the meaning of section 4 of the Highway Act. In each case these pronouncements have had adverse consequences for the complainants. I believe that the Ministry has erred in law in reaching its conclusion on the status of the roads at issue, and I have recommended that action be taken to rectify the complaints. To date, these recommendations have not been implemented.

While investigating the complaints of individual citizens, I often perceive underlying problems which have given rise to the specific complaints. From my investigation of these complaints, and others of a similar nature, I have become convinced that in many cases, the hidden culprit is section 4 of the Highway Act.

My investigation of the Smith and Farup complaints, as well as another complaint from Mr. Robert Newton of Farmington, led me to make a number of recommendations to the Ministry of Transporation and Highways in May 1982. When none of my recommendations on the three individual complaints or on section 4 were implemented by the Ministry, I made a further report to the Lieutenant Governor in Council in October 1983. After this report was reviewed by the Executive Council, my recommendation on Mr. Newton's complaint was resolved by the Minister of Transportation and Highways.

The complaints of Mr. Rankin Smith and Mr. Thomas Farup, which I have found substantiated, remain unresolved. Further, the larger issue of reform of section 4 of the Highway Act remains.

My recommendations and the grounds on which they are based are discussed in detail in the body of this report and documented in the attached appendices. Only two of my remaining recommendations request specific action for the complainants. The other four recommendations deal with my belief that the use of section 4 of the Highway Act by the Ministry of Transportation and Highways is a means of expropriation without compensation. I have, therefore, concluded that this statutory provision is unjust and recommend that it be phased out.

The response to my submissions, both to the Lieutenant Governor in Council and to the Ministry of Transporation and Highways, has been that implementation of my recommendations for reform of section 4 would be prohibitively expensive. The Ministry and the Executive Council have

therefore taken no action with regard to phasing out section 4 as a means of establishing public highways.

I am disappointed that no alternative proposal has been put forward which would provide greater certainty to landowners. Imaginative administrators should be able to devise a response which is both feasible and equitable. Continuation of the status quo results in hidden costs to government, although these costs are unlikely to outweigh the benefits. Perhaps a cynical view of the situation is that the government's vested interest in continuing to acquire public roads, without having to pay compensation, by the use of section 4 explains the lack of enthusiasm for reform of the law. As Ombudsman, however, I must be concerned about the injustice suffered by the citizen and the enormous cost and uncertainty which continues to face landowners for whom the question of section 4 is crucial.

During my years as Ombudsman I have often been told that the implementation of my recommendations would be too expensive. I have learned to take this response with a grain of salt. While I am always willing to consider practical alternatives, I believe that failing to rectify an ongoing injustice undermines society's belief in democracy and the rule of law.

I have already commented publicly on section 4 of the Highway Act in my Public Report No. 3 on Expropriation Issues, issued January, 1983. In addition to the remedies I seek for the two individual complainants, the

present report contains a factual backdrop for my concerns about section 4 and an elaboration of my earlier public comments.

My efforts to date in achieving a reform of the law and rectification of the individual complaints created by section 4 of the Highway Act have met with limited success. I, therefore, ask for the assistance of the Legislative Assembly in seeing that justice is done in these two complaints, and that the law which created those injustices (and others) is reconsidered.

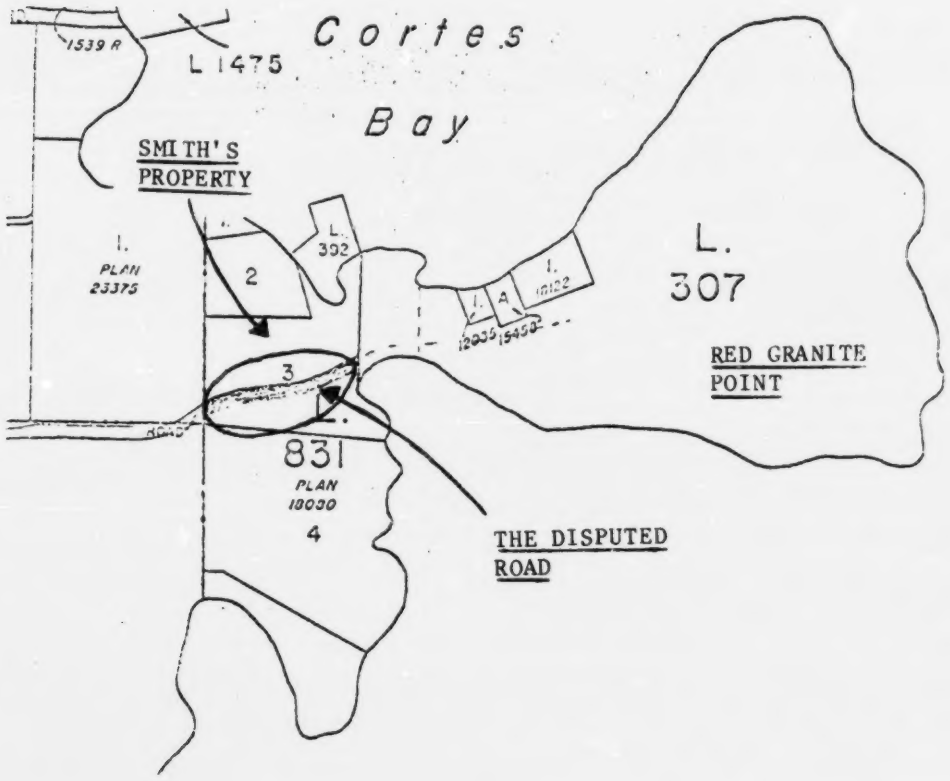
II. THE COMPLAINTS

A. Mr. Rankin Smith

Mr. Smith complained to my office in April, 1981 about the actions of the Ministry of Transportation and Highways with respect to a road which traverses property owned by his company, Cortes Bay Marina Corporation, on Cortes Island. (For ease of reference, I have included representative drawings or maps to illustrate the complaints I received from Mr. Smith and Mr. Farup).

In June of 1979, Mr. Smith placed a chain across a road on his property (known as Red Granite Road) where the road left his property and entered Red Granite Point. Mr. Smith took this action based on his belief that he owned this section of the road. He offered a key to the lock on the

chain to the other residents of Red Granite Point. A group of Mr. Smith's neighbours, objecting to his action, soon descended on his property and cut the chain that blocked the road. These neighbours subsequently appealed to the Ministry of Transportation and Highways for intervention.



By letter dated July 24, 1979, the District Highway Manager, acting on instructions from Ministry headquarters in Victoria, advised Mr. Smith that the road was public pursuant to section 6 of the Highway Act, R.S.B.C. 1960, c. 172 (now known as section 4 of the Highway Act, R.S.B.C. 1979, c.167.)

Two days later, Mr. Smith was tipped off by a friendly neighbour that a grader from the Ministry of Transportation and Highways was being sent to work on his portion of Red Granite Road. Mr. Smith immediately went to the west boundary of his property and asked the grader operator not to enter his property. The grader operator amicably complied with Mr. Smith's request that the portion of the road on his property not be graded and no further attempts were made to do so. (Section 4 provides that when public monies are spent on a private road, it automatically becomes a public road).

The Ministry's only record of expenditure of public monies on the road is the verbal statement, unsupported by any records that I could find, of the area foreman. He told my investigator that he graded the road once or twice a year in the few years preceding 1979. Mr. Smith and the former owner - who originally constructed the road - have each sworn under oath that they are not aware of any such grading. In fact, Mr. Smith frequently employed the services of a local contractor to grade the road. It would appear, therefore, that even if public monies were spent, they were spent without the consent and without the knowledge and acquiescence of the owners of the road at the time such work was done. (The importance of such consent or acquiescence is discussed in the next section, on the judicial interpretation of section 4).

During 1980, the Ministry of Transportation and Highways attempted to negotiate with Mr. Smith for a 66-foot right-of-way to widen the portion of Red Granite Road on his property. Based on its assertion that the

existing road was public pursuant to section 4, the Ministry would not accede to Mr. Smith's request that he be paid compensation for the improvement represented by the existing road and for the severance of his land into two parcels.

The Ministry's initial offer was $33,000, but this amount was ultimately increased to $58,000 in order to secure Mr. Smith's acceptance of the Ministry's terms, which was done in June, 1981. The payment of $58,000 did not, however, include compensation for the existing road or for severance of his property and Mr. Smith was required to sign a waiver of any future claims against the Ministry arising out of the taking of the property in question, before the funds would be released.

At the time of the settlement, the status of the existing road was one of the matters which were likely to be determined by the courts in a pending trespass action commenced by Mr. Smith against his neighbours. As my office was also in the process of forming an opinion on the legal status of the existing road, I asked the Ministry (Appendix B) to modify the waiver clause so that an agreement on compensation could be reached without prejudice to a claim from Mr. Smith for further compensation, should the existing road be determined to be private by a court or by my office.

The Ministry replied by letter dated June 26, 1981 (Appendix C), and refused to agree to my request. Mr. Smith ultimately decided to accept the $58,000 on the Ministry's terms anyway, because of his very poor

financial situation at the time.

Mr. Smith feels unjustly treated because he received no compensation for the value of the improvement represented by the road or for the severance of his property as the Ministry negotiated the settlement on the basis that the existing road, constructed by the former land owner on his private property, was already owned by the public. Mr. Smith also feels aggrieved by the fact that the Ministry extracted the waiver from him at a time when he could not afford to hold out for full justice on his claim.

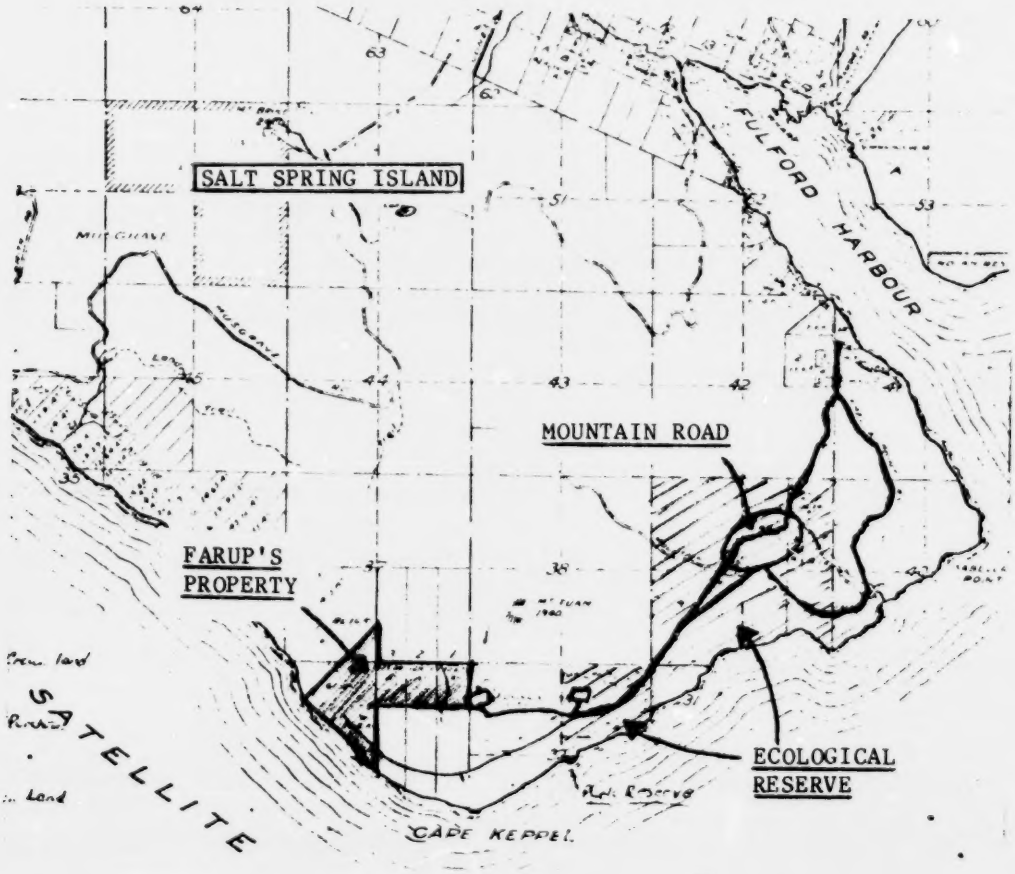
B. Mr. Thomas Farup

Mr. Farup applied for subdivision of his Salt Spring Island property in 1980. His application was rejected by an Approving Officer of the Ministry of Transportation and Highways on March 18, 1981. He subsequently complained to my office.

One of the major reasons given by the Approving Officer for the rejection was that Mr. Farup's property did not have access to a public highway. The second major reason for disallowance appeared negotiable, subject to the applicant's ability to overcome the access problem.

Mr. Farup acquired his property at the southern tip of Salt Spring Island in 1971. He received permission from the then Department of Lands to construct a road across adjacent Crown land to the north of his property. North of the Crown land lay a road which had been constructed

and gazetted as a public road by the Federal Department of Transport in 1965. Access to that road was provided by Mountain Road which has been in existence for about 50 years and traverses Crown land designated in 1971 as an Ecological Reserve. It appears that the only reason Mountain Road was not gazetted at that time was because the Superintendent of Lands had advised, by letter dated November 3, 1964, that "the road known as Mountain Road is public". Gazetting was, therefore, considered unnecessary.



In 1976, Mr. Farup wanted to upgrade Mountain Road to provide better access to his property and contacted the District Highways office. Mr. Farup states that the District Technician from the Saanich District office inspected the road with him and agreed to provide culverts for some of the watercourses traversing Mountain Road.

The District Technician states that he visited the site after the culverts were installed and that his agreement to provide the culverts was made on the telephone. He claims that he thought the culverts were to be installed in that part of the road north of the area in question (which the Ministry agrees is a public road). Clearly, Ministry employees who delivered the culverts and assisted in installation of at least one of them were well aware that the culverts were being installed on Mountain Road, even if the District Technician was not. The question is whether Mountain Road has automatically become a public road because of the expenditure of public funds (i.e. installation of the culverts) on the road.

A Highways' official stated that the Ministry only declares a road to be a public highway under section 4 when it is in the public interest to do so. In this case, if the road was considered public, the Ministry would incur substantial costs in upgrading it to acceptable standards. That offical mistakenly believes that section 4 gives the Ministry some discretion. It does not.

Mr. Farup believes that he has been unfairly treated because of the

Ministry's position that the road is not public when it is obvious that public monies have been expended on it.

III. THE LAW

A. Judicial Interpretation of section 4 of the Highway Act

What is now section 4 of the Highway Act was originally enacted in 1905, in a statute known as the Highways Establishment and Protection Act, 1905.

At the time of its enactment, a deadline was written into the section so that it would only apply to roads which had already been constructed. Obviously the Legislative Assembly did not intend that the section be used to create new public roads but only to protect roads on which public monies had been expended but which had not yet been surveyed and gazetted as public roads. The 1905 section read as follows:

> "All existing travelled roads not established prior to the passing of this Act by notice in the British Columbia Gazette, nor otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the district in which the roads are situated respectively, on any portion of which public money has been expended, shall be deemed and are hereby declared to be public highways."

It appears, however, that the Department of Highways was never able to keep up with the task of surveying and registering new public roads. In the years that followed, the Legislature extended the deadline for the applicability of section 4 three times until, in 1945, the deadline was

removed altogether. In its current form, section 4 provides as follows:

> **4. (1) Where public money has been expended on a travelled road that has not before then been established by notice in the Gazette or otherwise dedicated to public use by a plan deposited in the land title office for the district in which the road is situated, that travelled road is deemed and is declared to be a public highway.**
>
> **(2) This section does not apply where**
> **(a) the expenditure of public money is confined to expenditure for snowploughing or ice control; or**
> **(b) a travelled road forms part of an existing railway right of way and was, at the time public money was expended on it, owned by the Crown, a Crown corporation or agency, or formed part of a railway right of way.**

Throughout a series of court decisions in which section 4 was at issue, common law has developed on the proper interpretation of section 4. Below, I have set out each part of section 4, and after setting out each part, summarized the judiciary's interpretation of it.

"4. (1) Where public money has been expended . . ."

First, the expenditure of **public money** must be authorized and lawfully spent; the work involved cannot merely have been done in return for favours to the public employee doing the work: Schaub v. Quality Spruce Mills, November 8, 1963, (unreported) Smithers Registry #10/63 (County Court). Section 4 does not apply where the evidence of the expenditure of public money is imprecise and there are no records of such expenditures or it is not clear as to which road the money was spent on: Pimentel v. Van, June 24, 1977, (unreported) Vancouver C.A. Registry #1148/75 (Court of Appeal).

Secondly, the expenditure of public money must have been done with the consent, or with the knowledge and acquiescence, of the owner of the property: Schaub v. Quality Spruce Mills; San Souci Estates v. Sunny Harbour Estates, May 3, 1972, (unreported) Vancouver Registry #3626/70 (Supreme Court); The Corporation of Delta v. Trim (1982), 41 B.C.L.R. 58; Silverton v. Hobbs and Jupp (1985), 60 B.C.L.R. 208. In Delta v. Trim, Mr. Justice Bouck of the Supreme Court of British Columbia explained the reason for this requirement:

> The doctrine of an owner's intention to dedicate is not contained within the words of the statute. It developed at common law for these reasons. Ordinarily a government body can only acquire land from a private owner through purchase or expropriation. But s. 4 of the Highway Act gives such an entity the right to take property simply by showing it is in the nature of a travelled road and public money has been spent on its upkeep. As a result, the authority gets title without paying the owner one cent. Because of this, the law requires the authority to also prove there was an intention on the part of the onwer to dedicate the land in question.

"on a travelled road . . ."

Firstly, a travelled road is a road which, at the time of the expenditure of public money, was used by the general public with the express or implied consent of the landowner. That is, the public use of the road must predate the expenditure of public monies on the road: Schaub v. Quality Spruce Mills; Corporation of Delta v. Trim. The road cannot have been merely used to provide access to nearby residents, but rather must have been a "public passage" and used by the public in general: Pimentel v.

Van. It does not matter, however, that bars may have been placed across the road at various times: Saanich v. McFadden. (1922), 32 B.C.R. 221 (Supreme Court).

Secondly, a travelled road must be a "road" and not merely a "trail": Pimentel v. Van; and it must be possible to determine its precise location on the ground: Sans Souci Estates v. Sunny Harbour Estates.

"that has not before then been established by notice in the gazette or otherwise dedicated to public use by a plan deposited in the land title office for the district in which the road is situated, . . ."

This phrase appears to be relatively straight-forward, and I have been unable to find any judicial interpretation of it.

"that travelled road is deemed and is declared to be a public highway."

This phrase also appears to be straight-forward, and I have been unable to find any judicial interpretation of it. It is this phrase, however, which provides that any road which fits within the judicial interpretation of section 4 is automatically, by force of law, a public road. Neither the Ministry nor any person, has any discretion as to whether a road is, or is not, a public road under section 4.

A more detailed review of the legislative history and judicial interpretation of section 4 and its statutory predecessors is contained in the section headed "The Law" in my letter to the Ministry of

Transportation and Highways, dated March 30, 1982 (Appendix D). I would point out, however, that several of the more recent B.C. Supreme Court and B.C. Court of Appeal judgments are not included in that discussion. The latter decisions have not, in my view, substantially modified the law in this area.

My letter of March 30, 1982, set out my preliminary findings and proposed recommendations pursuant to section 16 of the Ombudsman Act. It is attached as Appendix D to this report. The Ministry's initial reply is contained in Appendix E.

B. THE LAW APPLIED TO THE CASES OF MR. SMITH AND MR. FARUP

In both complaints (Mr. Smith and Mr. Farup) officials of the Ministry stated an opinion as to whether or not the road in question was a public road. These opinions resulted in serious consequences for the complainants. The issue I faced was whether or not the decisions of Ministry officials in these cases were correct in light of the judicial interpretation of section 4, or whether they were based on a mistake of law. I review each case separately below.

Was the road through Mr. Smith's property a public road because of section 4?

It appeared to me that the road through Mr. Smith's property and into Red Granite Point could not be considered a public road for two reasons.

First, it was not a travelled road in the sense of being open and used by the general public. The road had, to my knowledge, only been used to provide access for Mr. Smith, the residents of Red Granite Point, and their guests.

Second, it was evident from the affidavits sworn by Mr. Smith and the former owner, that if public money was spent on the road it was clearly not with the consent of either of the owners, nor was it spent with their knowledge and acquiescence. It appeared to me that the Ministry's decision (that the road was public under section 4) was based on a mistake of law. The road was, in fact, a private road.

Is Mountain Road on Saltspring Island a public road because of section 4 ?

This question was more difficult to answer. It appeared to me that Mountain Road is a travelled road. It had been in existence for decades and had been travelled extensively by the public. It appeared to be a road, and not merely a trail. Public money was expended on Mountain Road. The Ministry provided culverts and Ministry employees assisted Mr. Farup's road contractor in the installation of the the culverts in various places throughout its length. What was more debatable was whether or not the owner of the property, in this case the Crown, consented to the expenditure of public monies on the road.

The District Technician who had approved the installation of the culverts asserted that he believed the culverts were to be installed in the

northern section of the road, and not where they were, in fact, placed. This evidence was, however, in contradiction to that of Mr. Farup who says that the District Technician travelled the road with him prior to the installation of the culverts and knew where he intended to place them, and where they were eventually placed. Clearly, Ministry employees who delivered the culverts and assisted in the installation of at least one of them knew very well where the culverts were being installed.

It seemed to me that even if the District Technician only intended to authorize the expenditure of public monies on the northern part of the road, this expenditure would have the effect of making the entire road a public road pursuant to section 4. A similar situation arose in the case of Saanich v. McFadden, cited above, and the decision of the Supreme Court in that case was subsequently affirmed by the Court of Appeal. Mr. Justice Murphy, in the Supreme Court, set out the relevant facts of that case as follows:

> "It is not established by the evidence that public money was expended on this specific section of the road prior to April 8, 1905, but it is established, in my opinion, that there was a travelled road from the old West Saanich road to the East Saanich road of which this section was a part long prior to that date and that public money was expended on various portions of such road both on sec. 57 and further to the east. This, I hold, makes this section a public highway under sec. 6 of the Highway Act, R.S.B.C. 1911, ch. 99."

It seemed to me that the same could be said in the case of Mountain Road. Clearly, public monies (from the federal purse) were spent on portions of Mountain Road to the south of the portion in question. And assuming the District Technician's evidence is correct, public monies

were authorized to be spent on the northern part of the road. It appeared to me that because public monies were in fact spent on various parts of the road, and in the case of the culverts these monies were authorized by and consented to by the owner of the road - the provincial Crown, Mountain Road is a section 4 road.

Since making my report to the Lieutenant Governor in Council, it has become apparent that one short section of Mountain Road does cross private land and cannot therefore be considered to be a public road. This does not change my view that the part of the road disputed by the Ministry is public.

IV. SECTION 4 AND ADMINISTRATIVE FAIRNESS

Section 4 of the Highway Act is, of course, a form of expropriation in that by virtue of the expenditure of public money on a travelled private road, the ownership of that road is immediately transferred to the Crown. The Law Reform Commission of British Columbia, in its 1971 Report on Expropriation, considered the effect of section 6 (now section 4) of the Highway Act and found that the use of section 6 by the then Department of Highways violated the Commission's proposed procedural safeguards for fair and reasonable expropriations. These procedural steps included: notice of intention to expropriate; approval for the proposed expropriation by a politically-responsible person or body; registration of notice of the expropriation on the title to the land affected;

compensation based on 100 percent of the market value of the land, with full disclosure of the basis of the offer; a bilateral right to invoke arbitration proceedings; and notice of possession by the expropriating authority. (Appendix J)

In the case of section 4, none of these procedural safeguards exist. Because a road has been graded or a culvert installed, the title to the land covered by the road may immediately transfer to the Crown. This arbitrary procedure has the potential of being used for improper purposes and can also result in quite unexpected consequences.

Not only may a person be deprived of his property without fair process, but sometimes no process is entered into at all: the mere event of a Ministry employee grading a private road can result in the instantaneous and compulsory transfer of the ownership of the road to the Crown.

I believe that section 4 of the Highway Act is unjust. Under section 22 of the Ombudsman Act, I may conclude that a statutory provision is unjust, where I have completed an investigation of a decision made pursuant to that provision. I may then make the recommendation I consider appropriate.

My reasons for finding section 4 of the Highway Act unjust are twofold. First, section 4 creates substantive injustice because it results in land being taken away from citizens by force of law, without compensation and without the knowledge and consent of the property owner. While the

courts have required that section 4 only applies where public monies are spent with the consent (and even that can be implied) of the property owner, I doubt if many property owners would acquiesce in work being performed if they knew that the ownership of the road is thereby immediately transferred to the Crown. Because of the wording of section 4, the only consent required for a road to be deemed public is consent to the performance of work on the road but not consent to the road becoming public property.

The second injustice resulting from section 4 of the Highway Act can best be characterized as formal injustice. This is because section 4 is so broadly phrased that considerable opportunity exists for it to be applied inconsistently. It is evident from my investigations of a number of complaints involving the application of section 4 that the Ministry of Transportation and Highways has not always taken consistent positions on whether a road is public under section 4. Similar cases have not always been treated in a similar way and section 4 has resulted in the transfer of ownership in land in some cases where neither the Ministry nor the property owner intended such an effect; this is arbitrariness at its worst.

Inconsistency of application can best be seen by comparing Mr. Smith's case with a second complaint I investigated in the early part of 1981. In Mr. Smith's case, the Ministry's claim of public status for Red Granite Road is based solely upon the unsupported and undocumented statement of a Ministry employee that he graded the road a few times. In the second

complaint (from 1981) the complainant had obtained a document signed by seven former Ministry employees, attesting that they had worked on the road, but the Regional Highway Engineer refused to accept that as sufficient to establish the public status of the road, without proof of authorization and proof of funds expended. This is clearly inconsistent with the Ministry's claim in Mr. Smith's case that the testimony of its grader operator, unsupported by any records, is sufficient to establish that the road through Mr. Smith's property is a section 4 road.

There are other equally serious consequences of section 4 and its use and application by the Ministry. The Law Reform Commission Report on Expropriation has identified the problem for a person or his lawyer in determining whether or not a particular road traversing the client's property is a section 4 road. Section 4 roads are not registered in the Land Title Office as are other public highways. In fact, no one really knows until it is determined by a court whether or not a particular road is or is not a public road under section 4. The opinions expressed by the Ministry of Transportation and Highways in the past regarding the section 4 status of particular roads has often confused the issue further and caused trouble and expense both for the complainants and, in some cases, for the Ministry itself.

Every year, disputes arise in which one person cuts off the access of his neighbour to the use of a road traversing the first person's property. The neighbour will then appeal to the Ministry and may argue that the road is a public road because of section 4.

In Mr. Smith's case, instead of permitting the private parties to go to court if they were unable to resolve the dispute among themselves, the Ministry intervened and asserted that the road was a section 4 road on the skimpiest of evidence. In the face of Mr. Smith's obstinacy, the Ministry increased its original offer of roughly $33,000, for the right-of-way enclosing the road, to one of $58,000 before Mr. Smith finally agreed to Ministry terms. This action was taken by the Ministry notwithstanding the fact that the residents of Red Granite Point had purchased their properties on the basis of "water access only".

In cases such as this, section 4 has the effect of making the status of the road uncertain, which results in disputes and friction between neighbours, and the Ministry finds itself drawn into these disputes. If section 4 was not in existence the Ministry could create a public road if it thought it necessary in the public interest. When the creation of a public road is not in the public interest, the neighbours would have to work it out among themselves, by one selling an easement or right-of-way to the other.

V. MY RECOMMENDATIONS AND THE MINISTRY'S RESPONSE

As noted, I informed the Ministry of Transportation and Highways of my preliminary findings on the Smith, Farup and Newton complaints by letter dated March 30, 1982. As I had not received any comment on my recommendations by May 20, 1982, I wrote at that time (Appendix F) to inform the Ministry of my conclusion that these three complaints were

substantiated, on the following grounds:

a) It is my belief that the decisions of the Ministry of Transportation and Highways concerning the status of the roads in question in each of the three complaints (Smith, Farup, and Newton) were based upon mistakes of law.

b) It is my belief that the decisions of the Ministry of Transportation and Highways concerning the status of the roads in question in each of the complaints were made pursuant to a statutory provision which is unjust. I refer, of course, to section 4 of the Highway Act.

On these grounds, I made the following recommendations:

A. Rectification of the Complaints

RECOMMENDATION #1

That the Ministry of Transportation and Highways pay compensation for the property expropriated from Cortes Bay Marina Corporation, of which Mr. Smith is the owner, in accordance with the expropriation provisions of the Highway Act. Compensation would include payment both for the improvement represented by the road and compensation for damages resulting from the severance of Mr. Smith's commercial property.

RECOMMENDATION #2

That the Ministry of Transportation and Highways advise Mr. Newton that the road traversing his property is considered to be a private road, or alternatively, if the road is considered to be necessary in the public interest, that the Ministry expropriate the road from Mr. Newton and pay compensation to him for it.

After my recommendations were reviewed by the Lieutenant Governor-in-Council, I was informed by a letter from the Minister of Transportation and Highways, dated May 24, 1984, that the Ministry would negotiate with Mr. Newton with a view to making an offer of compensation for the required right-of-way. An offer was made to Mr. Newton early this year, although a settlement has not been reached to date.

RECOMMENDATION #3

> That the Ministry of Transportation and Highways not decline to approve Mr. Farup's proposed subdivision on the grounds that there is no public road access to his property, and that he be informed of this decision in writing.

Since receiving a response to my report to the Lieutenant Governor in Council, I have decided to modify this recommendation, as it would appear that a short section of the road, some distance to the south, which provides access to the Farup property does cross private property. However, Mr. Farup has already constructed access over this property, with the consent of the private landowners.

I would therefore modify my position on the Farup complaint by recommending that the Ministry inform Mr. Farup that in the event that he is able to secure the dedication to the public of the short section of private road, he will then be considered to have public access to his property, for the purposes of subdivision approval.

B. Section 4 of the Highway Act

RECOMMENDATION #4

That the Ministry of Transportation and Highways reconsider section 4 of the Highway Act with a view to recommending legislative amendment so that it would become void and without effect as of June 1, 1987 and that title to all roads previously established as public by section 4 (or the predecessors of that section), and not subsequently gazetted, shall revert to the owners of the property through which such roads traverse.

RECOMMENDATION #5

That during the years prior to June 1, 1987 the Ministry of Transportation and Highways undertake to determine which roads, currently public under section 4, are necessary to serve the public interest and to legally survey and gazette such roads, and to file notice of such gazettings in the respective land title offices and with the present owners of the properties through which such roads traverse.

RECOMMENDATION #6

That prior to any road being gazetted pursuant to Recommendation #5, the Ministry of Transportation and Highways obtain a legal opinion as to whether or not the road in question is public according to the judicial interpretation of section 4, and that only roads which it is believed would be found by a court to be public pursuant to section 4 be gazetted pursuant to Recommendation #5.

RECOMMENDATION #7

That District Highways Managers be instructed to inform all persons, who, to their knowledge, use roads which are now public under section 4 to obtain access to their properties, of the legislative change contemplated in Recommendation # 4, and invite them to make submissions to the Ministry as to why such roads are necessary in the public interest and should therefore be gazetted by the Ministry.

In view of the fact that some time has now elapsed since I formulated these recommendations, the deadline included in Recommendations #4 and #5 would need to be revised.

By letter dated May 21, 1982 (Appendix G), the Assistant Deputy Minister of Transportation and Highways replied on behalf of the Ministry to my recommendations. Mr. Rhodes stated that the Ministry was not prepared to accept my general recommendations about section 4, but agreed that there was a need for more consistency in dealing with roads created pursuant to section 4. He noted that a policy would be developed for recommendation to the Minister at an early date.

Mr. Rhodes also expressed concern about the magnitude of the task which would be imposed should the Ministry implement my recommendations, as claimed that section 4 roads throughout the province comprised 38 percent of the total road system of 43,853 kilometres; I use the word "claimed" since, as noted above, there is often great uncertainty as to whether section 4 applies to a particular road and it can only be conclusively be determined by a court.

While I commend the Ministry for its new policy directive (Appendix H) in which Highways officials are properly informed of the conditions which must exist before the courts will agree that a road falls within section 4, I cannot accept the Ministry's failure to implement my recommendations #4 to #7 or to suggest acceptable modifications.

I did not consider the Ministry's reply of July 8, 1982 (Appendix H) to be an adequate response to any of my recommendations on the three individual complaints, or on the broader issue of section 4. Therefore,

I made a report of my investigation of these complaints to the Lieutenant Governor in Council in October, 1983. This report outlined my investigation and the steps which I had taken to date towards rectifying the individual complaints, and effecting reform of section 4.

VI MY REPORT TO THE LIEUTENANT GOVERNOR IN COUNCIL

I brought this matter to the attention of the Lieutenant Governor in Council for two reasons. First, I believed that the individual complainants had been treated unjustly by the Ministry of Transportation and Highways and that the Ministry wrongly refused to rectify the injustice. Second, I believed that section 4 of the Highway Act is a form of expropriation without compensation and is therefore unjust.

By letter dated May 24, 1984 (Appendix I), the Minister of Transportation and Highways, on behalf of the Executive Council, responded to my report. The decision of the Executive Council on the Smith complaint was that Mr. Smith's acceptance of compensation in the sum of $58,000 completed the matter. I cannot agree with this analysis, particularly as the Ministry refused to agree to my request that the matter of compensation be held in abeyance pending a court ruling on the status of the road. I note that the Executive Council has limited itself to a consideration of the fact of settlement in responding to my recommendation, and has taken no position on the status of the existing road. This issue is of course crucial in deciding whether or not the settlement made with Mr. Smith is fair.

The Executive Council's decision that negotiations be commenced by the Ministry of Transportation and Highways, to compensate Mr. Newton for the temporary half-mile road through his farm near Dawson Creek, provided a satisfactory resolution of the Newton complaint. I considered that complaint rectified by the actions initiated by the Executive Council, and I consider that complaint rectified.

In response to the Farup complaint, the Minister of Transportation and Highways does not discredit Mr. Farup's opinion with respect to the intended location of the culverts, although it differs from that of officials of his Ministry. However, the Minister goes on to note that even if this issue was resolved in Mr. Farup's favour, the property would still not have the required public access as other parts of the road are "not located on the gazette line and the road passes through ecological reserve and other private property."

From further inquiries carried out after receipt of Mr. Fraser's letter of May 24, 1984, it is clear that a section of the road, as noted above, does traverse private property. However, access has been constructed across this section by the complainant and others, with the consent of the private owners, and the complainant is confident that obtaining the necessary access across the private property, for the purposes of subdivision approval, could be readily resolved. Therefore, the status of the rest of the road still remains crucial to Mr. Farup's desire to subdivide.

I continue to be of the view that the road which provides access to the Farup property is public, pursuant to section 4 of the Highway Act, except for the half-mile section where it crosses private property. As I am of the view that the road's public status derives from section 4 of the Highway Act, I do not consider it to be relevant whether the road lies entirely within the gazette line or passes through ecological reserve -- all of that land is owned by the Crown.

In response to my general recommendations on reform of section 4, the Executive Council's decision was that implementation would be prohibitively expensive, "particularly in these days of restraint." Implementation of my recommendations #4 to #7, either by June 1, 1987 or thereafter, was therefore refused.

While I appreciate the need to demonstrate fiscal responsibility, I must reiterate that many proposals for law reform have met with the same criticism: that reform would be too costly. I believe that this objection should therefore receive close scrutiny by the Legislative Assembly.

In my view, the application of section 4 of the Highway Act should have been limited to the historical context within which it first came into being. That reform is long overdue is evidenced by the cases discussed in this report as well as from a number of cases reviewed by my office which have gone through the costly and uncertain process of review by the courts.

VII. CONCLUSIONS

As long as section 4 of the Highway Act continues in existence, there will be uncertainty with respect to the right of access and private property rights over disputed roads. While there are areas of the law which are necessarily complex, because of the subject matter with which they deal, it is my view that people have a right to expect that determining the ownership and status of a road will be a relatively straightforward matter. Because of section 4 of the Highway Act, this expectation continues to be disappointed.

In writing this report I hope not only to bring this matter to the attention of the Legislative Assembly, but also to direct public attention to the existence and effect of section 4 of the Highway Act. An increased public understanding of the law should, in the interim, afford some measure of protection and assistance to private citizens in ordering their affairs. That is, until such time as the recommendations put forth by the Law Reform Commission of B.C. in 1971, and now presented by my office, are implemented.

TABLE OF APPENDICES*

"A" - Section 4 of the Highway Act, R.S.B.C. 1979, c. 167.....33

"B" - June 24, 1981 letter from the Ombudsman to the then Assistant Deputy Minister, Mr. A.E. Rhodes, re: Rankin Smith.....34

"C" - June 26, 1981 response to Mr. Brent Parfitt from Mr. A.E. Rhodes, re: Rankin Smith.....37

"D" - March 30, 1982 preliminary report of the Ombudsman to Mr. A.E. Rhodes.....39

"E" - April 6, 1982 Mr. A.E. Rhodes acknowledgement letter to the Ombudsman.....58

"F" - May 20, 1982 final report and recommendations of the Ombudsman to Mr. A.E. Rhodes.....59

"G" - May 21, 1982 - Mr. A.E. Rhodes reply to preliminary report and acknowledgement of final report.....63

"H" - July 8, 1982 - Mr. A.E. Rhodes reply to Ombudsman's report and recommendations and copy of the Ministry's new policy directive (Circular Letter G8/82).....65

"I" - May 24, 1984 - Decision of the Executive Council with respect to the Ombudsman's report of October 17, 1983.....70

"J" - Law Reform Commission Report on Expropriation, 1971.....72

*For ease of reference the appendices are numbered consecutively at the top of the each page.

HIGHWAY ACT

CHAPTER 167

[Act administered by the Ministry of Transportation and Highways]

Part — Section
1 Establishment and Control of Highways — 2 - 16
2 Protection of Highways — 17 - 27
3 Classification and Improvement of Highways — 28 - 42
4 Protection of Bridges and Tunnels — 43 - 52
5 Trans-Canada Highways — 53 - 54
6 Controlled Access Highways — 55 - 58

Interpretation

1. In this Act

"highway" includes all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings and approaches and any other public way;

"land" includes land of every tenure and description, including foreshore and land covered with water, within the Province, and including land granted by Canada to a person.

RS1960-172-2, 1977-75-8

PART 1

Roads are public highways

2. All roads, other than private roads, are deemed common and public highways.

RS1960-172-4.

Highways vested in Her Majesty

3. Unless otherwise provided for, the soil and freehold of every public highway is vested in Her Majesty.

RS1960-172-5.

Certain roads are public highways

4. (1) Where public money has been expended on a travelled road that has not before then been established by notice in the Gazette or otherwise dedicated to public use by a plan deposited in the land title office for the district in which the road is situated, that travelled road is deemed and is declared to be a public highway.

(2) This section does not apply where

(a) the expenditure of public money is confined to expenditure for snowploughing or ice control; or

(b) a travelled road forms part of an existing railway right of way and was, at the time public money was expended on it, owned by the Crown, a Crown corporation or agency, or formed part of a railway right of way.

RS1960-172-6; 1968-53-8; 1972-26-1; 1978-25-334

The next case was heard in May of 1972 and was styled Sans Souci Estates Ltd. v. Sunny Harbour Estates Ltd. et al. The road in dispute here, known as the Evans Trail, was found by Mr. Justice Munroe of the Supreme Court of British Columbia, to be a "seldom used narrow footpath through the bush, obliterated and non-discernable in several places".

Mr. Justice Munroe made the following comments:

> "If the plaintiff is to succeed in this action, it must prove the location on the ground of the Evans Trail and that it is a private "travelled road" upon which public money has been expended, to the knowledge and with the acquiescence of the defendents or their predecessors in title. Upon the evidence I am satisfied that very modest sums of public money were expended by the Department of Highways on infrequent occasions from time to time during the period 1931 to 1956 to employ labourers who used hatchets to clear brush and to cut down overhanging branches (perhaps only on the vacant crown land) but in view of the vague and conflicting evidence I am not satisfied that the location of the Evans Trail through District Lot 4551 has ever been determined or is now capable of being determined with any sufficient degree of precision, nor am I satisfied that the owners of District Lot 4551 (present or past) ever knew of or consented to any such work being performed upon said property, nor am I satisfied that the trail ever was or is now a travelled road."

The court concluded that the Evans Trail was not a public trail on all three grounds. First, there was insufficient evidence to determine the precise location of the trail. Second, the court stated as follows:

> "In the absence of proof that any work which may have been performed by the Department of Highways on said lot was done with the knowledge and acquiescence of the then owners, the plaintiff's claim herein cannot succeed: Campbell v. Pond (1915) 44 N.B.R. 357 at 367 . . . ."

Third, his Lordship concluded that the Evans Trail was "not now a 'travelled road' because it never was an open way or public passage for vehicles, persons and animals and was not used with the consent, expressed or implied, of the owners to an extent justifying its designation as a 'travelled road' as that term is used in the Highways Act: Schaub v. Quality Spruce Mills Ltd."

The next case, Pimentel v. Van was heard in 1975 in the Supreme Court of British Columbia, and was subsequently affirmed in 1977 on appeal to the British Columbia Court of Appeal. The road at issue in this case ran north along the east side of Adams Lake, across the Pimentel property, and into the property owned by Shuswap Beach Estates (the Vans). The court noted that the road was constructed by some of the early settlers in the area, using private monies, in order to provide access to their properties. The Vans had been advised by the Department of Highways that the road was a public highway, pursuant to section 6 (now section 4), but when the Vans attempted to use it, the Pimentels sued for trespass, alleging that the road across their property was a private road. This was the issue that faced the court.

The court first considered whether or not the road was a public road pursuant to a federal statute, and regulations enacted thereunder. The court concluded that these provisions did not create a public road. The plaintiffs next argued that the road across the Pimentel property was a public road because the road had been dedicated as a public way by implication. The court found that use of the road had been permitted only as an accommodation to neighbours, and could not be construed as an intention to dedicate it to public use.

The court next considered whether the road was a public road pursuant to section 6 (now section 4) of the Highway Act. Evidence was led that some of the previous owners of both properties had worked their taxes off, during the Depression, on this road. The court found that the evidence concerning both the amount of work and the amount of taxes involved was very imprecise and that there were no records, nor was it clear as to which particular trail on which the work was done. The court stated as follows:

> "It would appear to me to be a singular result if a local road foreman in such a desultory fashion and in the circumstances here, could permit persons to do work on their own and immediately neighbouring properties for their own benefi only with no, or no proper, records being kept for the purposes of the Highway Act, and thereby make a road or trail public. If it becomes public, it becomes public for all persons including the crown and for all purposes including, of course, such responsibility as may go with that status under the Highway Act or otherwise. I would not so interpret section 6."

The court concluded that the evidence "does not show an expenditure of public money as contemplated within section 6 whichever wording one has regard to, including the current section 6".

File No: 80 0957
June 24, 1981

DELIVERED BY HAND

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mr. Rankin Smith
Cortez Bay Marina Corporation

Thank you for your letter of June 3rd, 1981.

It remains my intention to investigate the first aspect of Mr. Smith's complaint, that is the assertion by your Ministry that the existing road which traverses property owned by the Cortez Bay Marina Corporation on Cortez Island is a public road pursuant to section 4 of the Highway Act. I would therefore ask that the information requested from your Ministry in my letter of May 25th, 1981, be received in my Victoria office within one week of the date of this letter.

I understand that your Ministry is very close to reaching an agreement with Mr. Smith, with respect to the compensation which should be paid for the property being acquired by your Ministry. Mr. Smith advises me that the offer of compensation from your Ministry is based on your Ministry's assertion that the existing road is a section 4 road and hence no compensation is payable, either for the existing road or as damages for severance. You will appreciate that it is possible that I may conclude, as a result of my investigation of this issue, that your Ministry has improperly asserted that the existing road is a public road, and it would therefore follow that, in my opinion, the existing road is a private road. I understand also that this issue will likely be determined in the trial of Mr. Smith's action for trespass which will be heard sometime this fall.

...2

It is my understanding that it is the policy of your Ministry to include within an agreement, such as the one now being negotiated with Mr. Smith, a provision to the effect that the property owner agrees to waive any future claims against the Ministry arising out of the taking of the property in question. Given that I will be forming an opinion as to the legal status of the existing road in the near future, and that the court will probably be determining this issue sometime this fall, I would ask that your Ministry modify this clause, in this case, so that an agreement can be reached without prejudice to a claim from Mr. Smith for further compensation should the existing road be found to be a private road. I know that your Ministry is anxious that property owners be fairly and properly compensated in circumstances such as these, and I trust that you will find my request acceptable. I would ask that you provide me with your response (either orally or in writing) to this request by twelve o'clock noon on Friday, June 26, 1981.

You will recall that in my letter of May 25th, 1981, I stated that Mr. Smith had complained about the "actions of your Ministry in relation to a road...which traverses property owned by Cortez Bay Marina Corporation on Cortez Island." To be more precise, Mr. Smith's written complaint reads as follows:

> "I wish to complain about the actions of the Ministry of Transportation and Highways regarding the private road traversing my property on Cortez Island.
>
> R.B. Smith"

I had, at that time, identified two issues in this complaint, and informed you that while I would investigate the first issue (respecting your Ministry's assertion that the road is a public road), I would not be investigating the second issue (concerning the negotiations which I understand are currently underway between Mr. Smith's company and your Ministry).

There appears to be a third issue in this matter which I have now decided to investigate as well. This issue is whether or not your Ministry has acted properly in seeking to acquire property and construct a public road across the property owned by Cortez Bay Marina Corporation on Cortez Island. At this point I have formed no

...3

opinion on the merits of either of these issues in Mr. Smith's complaint, and I look forward to the cooperation of your staff in completing these investigations. I have asked Rick Cooper of my Victoria office to investigate these matters on my behalf; please contact Mr. Cooper at 387-5855 should you wish to discuss these matters further.

Yours sincerely,

Signed by
B. P.

Karl A. Friedmann
Ombudsman

Province of
British Columbia

OFFICE OF THE
DEPUTY MINISTER

Ministry of
Transportation
and Highways

940 Blanshard Street
Victoria
British Columbia
V8W 3E6
Phone 387-3280

YOUR FILE: 80-0957

OUR FILE 64-20-24

June 26th, 1981.

Mr. Brent Parfitt,
Office of the Ombudsman,
8 Bastion Square,
Victoria, B. C.
V8W 1H9

Dear Mr. Parfitt:

Re: Mr. Rankin Smith -
Cortez Bay Marina Corporation.

I make reference to your letter of June 24th, 1981, relative to the above.

I can appreciate that notwithstanding my letter of June 3rd, 1981, it is your intention to proceed with an investigation of Mr. Smith's complaints and as it has now become a distinct possibility that our efforts to negotiate a settlement have been negated by your interest, it is advisable that you be provided with the background.

The problem arose as a result of Mr. Smith's action in blocking the road across his property which provided access to several neighbours and the neighbours in turn, appealed to the Minister of Transportation & Highways for relief. When the sought after relief was not immediately forthcoming, the neighbours cut the chain which obstructed their access and Mr. Smith countered with trespass charges and litigation is pending. The neighbours sought an injunction and this Ministry provided them with an affadavit to the effect that the road was indeed public, pursuant to Section 4 of the Highway Act. This position is unalterable.

In an effort to conclude the problem, the Ministry attempted to acquire a sufficient right-of-way necessary to improve the road to a more appropriate standard, however, these plans were abandoned when Mr. Smith refused to negotiate further, following an arranged meeting with the Assistant Director of Property Services.

At a later date, Mr. Smith appealed to the Assistant Deputy Minister, Operations, for his intervention and it was agreed that we would re-open negotiations provided that he accepted our opinion that the existing road was public by virtue of Section 4 and that he would not be compensated for severance or other damages. It was further understood that he will withdraw the litigation taken against his neighbours if a satisfactory cash settlement could be agreed upon. Conversely, the neighbours would agree to withdraw any counter claims that they may

..... 2

have. Negotiations have proceeded amicably on this basis and Mr. Smith has advised us that he will accept the revised offer of $58,000.00 and that he will sign an agreement accordingly. As previously stated, these negotiations appear now to have been delayed and we have yet to receive the executed agreement as anticipated.

Until the agreement is signed, we are of the opinion that litigation is ongoing, however, in spite of this, we are prepared to forward to you a copy of the affadavit sworn by Mr. Johnson to the effect that the existing road is, in fact, public. I trust that such will be of some value in your investigation.

I have also noted your comments with respect to a supposed "third issue", however, as negotiations have been continued at the request of Mr. Smith and our offer of compensation is most generous, there is little doubt that you will concede that we have responded in a most professional and proper manner.

Yours very truly,

A. E. Rhodes,
Asst. Deputy Minister.

AER/CW
Encl.

Legislative Assembly
Province of British Columbia

OMBUDSMAN

- 39 -

Parliament Square
Victoria
British Columbia
V8W 1H9
Telephone (604) 387-5855
Zenith 2221

March 30, 1982

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Section 4 of the Highway Act;

Mr. Rankin Smith
Cortez Bay Marina Corporation
Cortez Island, B. C.

Mr. Robert J. Newton
Farmington, B. C.

Mr. Thomas Farup
Ganges, B. C.

I have now substantially completed my investigations of the complaints received from the above-captioned persons, and I am writing, pursuant to section 16 of the Ombudsman Act, to inform you of the grounds which appear to exist in these cases upon which I may make recommendations.

This letter is in four parts; first, the facts of each case as I have found them; second, a review of section 4 of the Highway Act as it has been interpreted by the judiciary; third, the grounds which appear to exist upon which I may make recommendations; and, fourth, my proposed recommendations.

You may recall that I had earlier informed you of my intention to investigate whether or not your Ministry had acted in the public interest in seeking to create a road through property owned by Cortez Bay Marina Corporation. That issue is not reviewed here; I may discontinue my investigation of that matter depending upon the outcome of the investigations discussed herein; for example, if your Ministry were to pay

compensation to Mr. Smith for the road which your Ministry has asserted is a section 4 road, it may no longer benefit Mr. Smith for me to complete my investigation of the "public interest" aspect of his complaint.

THE FACTS:

Re: Rankin Smith

In June of 1979, Mr. Smith decided to assert his believed ownership of the road which traverses his property and leads to Red Granite Point. He placed a chain across the road where it leaves his property and enters Red Granite Point, and apparently offered a key to the lock on the chain to each of the residents of Red Granite Point. This caused concern among some of the residents of the Point, and they in turn appealed to the Ministry for assistance. By letter dated July 24, 1979, Mr. George Kent, District Highway Manager, acting upon instructions from Ministry headquarters in Victoria, advised Mr. Smith that the road was public pursuant to section 6 of the Highway Act, R.S.B.C. 1960, chapter 172 (hereinafter referred to as section 4 as it now appears in the Highway Act, R.S.B.C. 1979, chapter 167).

The Ministry's only evidence of the expenditure of public monies on the road is the testimony, unsupported by any records, of the Area Foreman, who asserts that he graded the road once or twice a year in the few years preceding 1979. Mr. Smith, and the former owner, Mr. Art Wannlund have each sworn under oath that they are not aware of any such maintenance. In fact, Mr. Smith frequently employed the services of a local contractor to grade the road. It would appear, therefore, that even if such monies were spent, they were spent without the consent, and without the knowledge and acquiescence of the owners of the road at the time such work was done.

Re: Mr. Robert Newton

Mr. Newton has a farm near Dawson Creek. In about 1971 he agreed to permit neighbouring farmers to construct a road through his property so that they could obtain access to their fields. The main part of the road was apparently on a public right-of-way, but it was necessary to make a loop through Mr. Newton's land in order to avoid a deep gully. Mr. Newton agreed to this work, and the installation of a culvert by the District Highways crew, on the understanding that the road was temporary only and would be moved back onto the public right-of-way when funds became available. Ten years later, Mr. Newton went in to visit the local Highways Manager who informed him that the road through his property was a permanent public road because of section 4 of the Highway Act.

Re: Mr. Thomas Farup

Mr. Farup acquired property right at the southern tip of Saltspring Island in 1971. He received permission from the then Department of Lands to construct a road across adjacent Crown land to his property. North of the Crown land lay a road which had been constructed, and gazetted as a public road by the federal Department of Transport in 1965. Access to that road was provided by Mountain Road which has been in existence for about 50 years and traverses Crown land designated as an Ecological Reserve. It appears that Mountain Road was not gazetted at that time also because the Superintendent of Lands had advised, by letter dated Novewmber 3, 1964, that "The road known as 'Mountain Road' is public."

In 1976, Mr. Farup wanted to upgrade Mountain Road and contacted the District Highways Office. Mr. Farup says that Mr. Eric Smith from the Saanich District office came out and inspected the road with him, and agreed to provide culverts for some of the watercourses traversing the road. Mr. Smith says that he visited the site after the culverts were installed, and that his agreement to provide the culverts was made on the telephone. Mr. Smith says that he thought that the culverts were to be installed in that part of the road north of the area in question.

Mr. Farup subsequently submitted a subdivision proposal for approval by the Ministry's approving officer. The proposal was rejected, in part, for the reason that "the subdivision does not have access to a public highway." The Ministry did not agree that Mountain Road was a public road because the installation of the culverts had resulted in the road becoming public pursuant to section 4 of the Highway Act.

THE LAW

What is now section 4 of the Highway Act was originally enacted by chapter 26 of the Highways Establishment and Protection Act, 1905. The section at that time read as follows:

> "All existing travelled roads not established prior to the passing of this Act by notice in the British Columbia Gazette, nor otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the district in which the roads are situated respectively, on any portion of which public money has been expended, shall be deemed and are hereby declared to be public highways."

It is noteworthy how the section was restricted to apply only to roads which had not been presented or dedicated prior to 1905. This qualification was carried into the revised statutes of 1911 and the first

part of the relevant section in the 1911 Act stated as follows:

> "All existing travelled roads not established prior to the 8th day of April, 1905, by notice in the Gazette, or otherwise dedicated to the public use by a plan deposited . . . "

The Highway Act Amendment Act, 1922 repealed the section and substituted it with the following, which had the effect of extending the application of the section another 17 years:

> "All existing travelled roads not heretofore established by notice in the Gazette or otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the district in which the roads are situated respectively, on any portion of which public money has been expended, shall be deemed and are hereby declared to be public highways."

The same time limit on the application of the use of the section was carried into the Revised Statutes of 1924. Again, the consolidated section referred back to the date that the statute had been repealed and substituted in 1922, as follows:

> "All travelled roads existing on the 16th day of December, 1922, not theretofore established by notice in the Gazette, or otherwise dedicated . . . ."

In 1930, this section was again repealed and substituted with a section which moved the applicability of the section ahead another eight years. The 1930 section read as follows:

> "All existing travelled roads not heretofore established by notice in the Gazette, or otherwise dedicated . . . "

And again, the revised statutes of 1936 referred back to the 1930 amendment. The revised section read as follows:

> "All travelled roads existing on the 1st day of April, 1930, not theretofore established by notice in the Gazette, or otherwise dedicated . . . . "

In 1939, the effective date of the section was again moved ahead, to 1939. It appears that by 1945, either Ministry officials were getting tired of asking the Legislative Assembly to keep moving the effective date of the section ahead in time, or that the Legislative Assembly was weary of making the required amendments. In the Highway Act Amendment Act, 1945, the section was substantially amended and the time limit taken out.

That section read as follows:

> "Where public money has been expended on a travelled road that has not been theretofore established by notice in the Gazette or otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the district in which the road is situate, that travelled road shall be deemed and is hereby declared to be a public highway."

The section remained in that form until 1968 when it was re-numbered sub-section 1 and the following added as sub-section 2:

> "This section does not apply where the expenditure of public money is confined to expenditure in respect of snow ploughing and ice control or either of them."

This section, at that time section 6 of the Highway Act, was again amended in 1972 to expand the exceptions to the applicability of the section. Thus sub-section 2 of section 6 was amended to read as follows:

> "This section does not apply where
>
> (a) the expenditure of public money is confined to expenditure in respect of snow ploughing or ice control; or
>
> (b) a travelled road forms part of an existing railway right-of-way and was, at the time public money was expended on it, owned by the crown, a crown corporation or agency, or formed part of a railway right-of-way."

The section as it reads today is found in the Highway Act, chapter 167, R.S.B.C. 1979. It states as follows:

> "4. (1) Where public money has been expended on a travelled road that has not before then been established by notice in the Gazette or otherwise dedicated to public use by a plan deposited in the Land Title Office for the district in which the road is situated, that travelled road is deemed and is declared to be a public highway.
>
> (2) This section does not apply where
>
> (a) the expenditure of public money is confined to expenditure for snow ploughing or ice control; or
>
> (b) a travelled road forms part of an existing railway right-of-way and was, at the time public money was expended on it owned by the crown, a crown corporation or agency, or formed part of a railway right-of-way."

Since two persons reading a statutory provision can often find different meanings in the same provision, it has fallen upon the courts in our society to interpret statutes for us. Section 4 has been at issue in a number of cases before the Courts of British Columbia and therefore has been subject to judicial interpretation.

The first case, Saanich v. McFadden, [1923] 1 D.L.R. 1170, was heard before the British Columbia Supreme Court, and subsequently affirmed on appeal to the British Columbia Court of Appeal.

Regretfully, the Reasons for Judgment in either court do not tell us in what form public money was expended on the road in question. Rather, the court merely states as follows:

> "It is not established by the evidence that public money was expended on this specific section of the road prior to April 8, 1905, but it is established, in my opinion, that there was a travelled road from the Old West Saanich Road to the East Saanich Road of which this section was a part long prior to that date and that public money was expended on various portions of such road both on section 57 and further to the east. This, I hold, makes this section a public highway under section 6 of the Highway Act, R.S.B.C. 1911, chapter 99.
>
> "I find that bars were, at times, placed across the road of which this section formed part . . . but that it is not proven by whom or for what purpose such bars were erected. "This fact, of itself, does not conclude the question of highway or no highway even when section 6 of the Highway Act does not apply. . . "
>
> "In my opinion, however, section 6 of the Highway Act is on the evidence decisively in favour of the plaintiff in this issue, as that section makes no provision for exempting roads that otherwise fall within its ambit because owners have erected bars which from time to time were actually set up across such roads."

The next case which I have been able to discover, in chronological order, is styled Schaub v. Quality Spruce Mills Ltd., heard in Smithers by Mr. Justice Harvey of the County Court of British Columbia on November 8, 1963. The learned Judge set out all of the facts upon which he based his decision, and provided his reasons in detail.

Mr. Schaub had purchased a quarter section of land that lay roughly one and a half miles north of Highway 16. Access was gained to the land by a very poor farm road which left Highway 16, travelled through the land, and

continued on for a few miles to the timber-lease area of Quality Spruce Mills. The road was apparently passable only by four-wheel drive vehicles during the wet season, and this was the way Schaub wished to retain it in order to preserve his privacy. However, in late '62, Quality Spruce Mills reconstructed the road and brought it up to the standard of a first-class gravelled highway. Schaub sued for trespass.

The court first surveyed the question of whether or not the road on Schaub's property had been excluded from the crown grant, under the proviso that "all travelled streets, road, trails and other highways . . . shall be excepted from this grant". The court concluded that since the road at that time only went part way into Schaub's property, it could not be called a "travelled" road, and therefore was not excepted from the crown grant.

In the years prior to 1951, it appears that the road running north to about the middle of Schaub's property, was extended in an easterly direction about a mile and a half. Consequently, the road northerly into Schaub's property from Highway 16, continuing easterly a mile and a half, was identified as No. 70 - Jarman Road by the Department of Highways and was believed by the Department of Highways to be a public road. The evidence of the District Superintendent and the area road foreman was sufficient to convince His Honour that public funds had been lawfully used for the maintenance of that road since 1953. The court also found that "the public had access to and did in fact travel upon this road to an extent justifying its designation as a 'travelled' road as that term is used in section 6 [now section 4] of the Highway Act". The court therefore concluded that No. 70 - Jarman Road was a public road pursuant to section 6 of the Highway Act.

The court went on to consider whether the remainder of the road on Schaub's property which went northerly into Quality Spruce Mills' property was a public road. The court discussed the evidence as follows:

> "An attempt was made to show that public money had been expended on the road . . . . At most a Department of Highways snow plough operated there between the Larson turn-off and the cabin on one or two occasions, but this was done as a favour to Wilson and in return for favours extended by him to the operator in supplying him with hot coffee and helping to extricate the snow plough when it became stuck on No. 70 - Jarman Road. This is not the expenditure of public money on a travelled road. To the extent that public money was involved it was neither authorized nor lawfully spent; nor was the road a travelled road in the sense of used by the general public with the expressed or implied consent of the landlord."

The court concluded that this part of the road was a private road.

The court went on to consider whether or not the road could be said to have been a "travelled road". His Lordship stated as follows:

> "Travelled conveys the notion of being frequented by travellers. These trails and such a small portion thereof as might be regarded as a road were not that in any real sense. If used to any extent at all at that time they were used as a means of ingress and egress for the few people living there and their few visitors, or by a few native and other people at such times as the hunting season. . . . Even if one were to conclude that there was here an expenditure of public money within the contemplation of the section (which I do not) it was not expended on 'travelled road'."

The court granted a declaration to the Pimentels that the road across their property was a private road. In a lengthy decision by Seaton, J.A., the Court of Appeal reviewed each of the trial judge's findings and affirmed them.

The remaining two cases which I have discovered concerning section 4 of the Highway Act, are both decisions of lower courts, and, with respect, are not particularly helpful in further clarifying the proper interpretation of section 4.

The first case was a 1979 decision of the County Court in Kelowna and was styled El Rancho Vista Farms Ltd. v. Nunweiler Development Corporation. In this case, the road in question was a short section of road in the Village of Oliver. The former Works Superintendent for the Village of Oliver testified that the road was used regularly by the public, and that it had been regularly maintained by the Village. With respect to the expenditure of public monies, the Works Superintendent testified that it had been ploughed once and was regularly inspected for "any pot holes and the likes". Later in his evidence, the Works Superintendent stated that the only maintenance required was "just a trip down there occasionally to kick some rocks or sticks off it".

In a short oral judgment, the court stated as follows:

> "It is clear in my view from the evidence of Mr. Muir that public monies had been expended on the road involved here, not just in snow removal, but in general maintenance as required.
>
> "Section 6 of the Highways Act in my opinion applies . . . . "

The final case was heard in January of 1980 by the Small Claims Division of the Provincial Court of British Columbia in Invermere, and was styled Pender v. Green. In this case the plaintiff alleged that the defendant, an employee of the Department of Highways, trespassed on his property by

removing a gate blocking the road in question. In a short written judgment, His Honour stated as follows:

> "Although Exhibit 10, a public works report for 1912-1913 shows an expenditure of $4,524.37, I agree with the plaintiff's submission that there is no evidence establishing that this money was spent at the southerly end of the lake and no evidence to show that it was spent on the road in question.
>
> "The expenditure mentioned above as stated cannot be attributed to Grainger Road.
>
> "In the public works report of 1919-1920, there is noted an expenditure of $18.00 on Grainger Road; however, there is no explanation of what this sum of money was used for; it could easily have been spent for snow removal or ice control, and that being exempt under section 6(2)(a) of the Highway Act cannot, in the absence of any proof of actual work done on the road as contemplated by section 6(1) be used to support the defendent's argument.
>
> "I could not see in any of the evidence any proof at all that the Department of Highways had expended such monies on this road as to bring it under section 6(1) of the Highways Act."

It may be recalled that section 6(2)(a) of the Highway Act, referred to by His Honour, was enacted in 1968. The court concluded that the road in dispute was a private road.

B. Summary of Judicial Interpretation of Section 4

As has been seen from the above review of the cases considered by the Courts in which section 4 was at issue, the Courts have throughout these cases developed a judicial interpretation of section 4. Below, I have set out each part of section 4, and have after setting out each part, summarized the Courts' interpretation.

> "4. (1) WHERE PUBLIC MONEY HAS BEEN EXPENDED . . .
>
> Firstly, the expenditure of PUBLIC MONEY must be authorized and lawfully spent; the work involved cannot merely have been done in return for favours to the public employee doing the work: Schaub v. Quality Spruce Mills. Section 4 does not apply where the evidence of the expenditure of public money is imprecise and there are no records of such expenditures OR it is not clear as to which road the money was spent on: Pimentel v. Van.

Secondly, the expenditure of PUBLIC MONEY must have been done with the consent, or the knowledge and acquiescence, of the owner of the property: Schaub v. Quality Spruce Mills, Sans Souci Estates v. Sunny Harbour Estates, Campbell v. Pond.

ON A TRAVELLED ROAD . . .

Firstly, a TRAVELLED road is a road which, at the time of the expenditure of public money, was used by the general public with the expressed or implied consent of the landowner: Schaub v. Quality Spruce Mills. The road cannot have been merely used to provide access to nearby residents, but rather must have been a "public passage" and used by the public in general: Pimentel v. Van; it does not matter however that bars may have been placed across the road at various times: Saanich v. McFadden.

Secondly, a travelled ROAD must be a "road" and not merely a "trail": Pimentel v. Van; and it must be possible to determine its precise location on the ground: Sans Souci Estates v. Sunny Harbour Estates.

THAT HAS NOT BEFORE THEN BEEN ESTABLISHED BY NOTICE IN THE GAZETTE OR OTHERWISE DEDICATED TO PUBLIC USE BY A PLAN DEPOSITED IN THE LAND TITLE OFFICE FOR THE DISTRICT IN WHICH THE ROAD IS SUTUATED, . . .

This phrase appears to be relatively straight-forward, and I have been unable to find any judicial interpretation of it.

THAT TRAVELLED ROAD IS DEEMED AND IS DECLARED TO BE A PUBLIC HIGHWAY.

This phrase also appears to be relatively straight-forward, and I have been unable to find any judicial interpretation of it. I would say however that this phrase provides that any road which fits within the judicial interpretation of section 4 is automatically, by force of law, a public road. Neither the Ministry, nor any person, has any discretion as to whether a road is, or is not, a public road under section 4.

THE GROUNDS UPON WHICH I MAY MAKE RECOMMENDATIONS

The three cases which I have previously outlined raise major issues concerning the expropriation of private property by government authorities. Section 4 of the Highway Act is, of course, a form of expropriation in that by virtue of the expenditure of public money on a

travelled private road, the ownership of the road immediately transferred to the Crown. I discuss these issues in Part B of this section below; in Part A, I discuss the cases of the three complainants.

A. The Cases of Mssrs. Smith, Newton and Farup

In each of the three cases which I have investigated, officials of the Ministry stated an opinion as to whether or not the road in question was a public road. These opinions have resulted in serious consequences for the complainants.

In Mr. Smith's case, the Ministry asserted that the road through his property was a section 4 road, and consequently refused to pay compensation for the road or for severance damages at the time of acquiring a sixty-six foot right-of-way.

In Mr. Newton's case, the Ministry asserted that the road through his property was a section 4 road, and Mr. Newton is left with a permanent road through his property, for which he has not received compensation, and which is contrary to his understanding that the road was temporary only and was to be moved on to the public right-of-way as soon as possible.

In Mr. Farup's case, the Approving Officer concluded that Mountain Road was not a section 4 road with the result that Mr. Farup is prevented from subdividing his property.

I must now consider whether or not the decisions of Ministry officials in these cases were correct, in light of the judicial interpretation of section 4, or whether they were based upon a mistake of law. I consider each case seperately.

Is the road through Mr. Smith's property a Section 4 road?

It appears to me that the road through Mr. Smith's property, and into Red Granite Point, cannot be said to be a public road for two reasons. First, it is not a travelled road in the sense of being open and used by the general public. The road has, to my knowledge, only been used to provide access for Mr. Smith, the residents of Red Granite Point, and their guests. Second, as can be seen from the affadavits sworn by Mr. Smith and Mr. Wannlund, the former owner, if public money was spent on the road, it was clearly not with the consent of the owners, nor was it spent with their knowledge and acquiescence. It appears to me that the decision of the Ministry that the existing road through Mr. Smith's property was based upon a mistake of law, and that the road in fact is a private road.

Is the road through Mr. Newton's property a Section 4 road?

It appears to me that the road through Mr. Newton's property is not a public road for the simple reason that at the time of the installation of the culvert in the road, the road was not a travelled road. The installation of the culvert was done at the time of the construction of

the road; this could not be said to be the expenditure of public money "on a travelled road that has not before then been established . . . ", as required by section 4. Further, it seems to me that Mr. Newton's consent to the expenditure of public funds on the road was conditional on his understanding that the road was to be temporary only. It therefore appears to me that the Ministry's assertion that the road through Mr. Newton's property is a public road was based upon a mistake of law, and that the road in fact is a private road.

Is Mountain Road on Saltspring Island a Section 4 road?

This question is much more difficult to answer. It appears to me that Mountain Road is a travelled road in that it has been in existence for decades and has been travelled extensively by members of the public; further it appears to me that it is a road and not merely a trail. Public money was expended on Mountain Road by the Ministry by providing culverts and by Ministry employees in assisting Mr. Farup's road contractor to install the culverts in various places throughout its length. What is more debatable is whether or not the owner of the property, in this case the Crown, consented to the expenditure of public monies on the road.

Mr. Smith, the District Technician in Saanich, asserts that he believed that the culverts were to be installed in the northern part of the road, and not where they were in fact placed. This evidence, however, is in contradiction to that of Mr. Farup who says that Mr. Smith travelled the road with him prior to the installation of the culverts and knew of the locations where he intended to place them and where they were eventually placed. Clearly, Ministry employees who delivered the culverts and assisted in the installation of at least one of them were well aware of where the culverts were being installed. It seems to me that even if Mr. Smith only intended to authorize the expenditure of public monies on the northern part of the road, this expenditure would have the effect of making the entire road a public road pursuant to section 4. A similar situation arose in the case of Saanich v. McFadden, and the decision of the Supreme Court in that case was subsequently affirmed by the Court of Appeal. Mr. Justice Murphy, in the Supreme Court, stated as follows:

> It is not established by the evidence that public money was expended on this specific section of the road prior to April 8, 1905, but it is established, in my opinion, that there was a travelled road from the old west Saanich road to the East Saanich road of which this section was a part long prior to that date and that public money was expended on various portions of such road both on sect. 57 and further to the east. This, I hold, makes this section a public highway under sec. 6 of the Highway Act, R.S.B.C. 1911, ch. 99

It seems to me that the same can be said in this case. Clearly public monies (from the federal purse) were spent on portions of Mountain Road to the south of the portion in question, and, assuming Mr. Smith's evidence is correct, public monies were authorized to be spent on the northern part of the road. It appears to me that given that public monies were in fact spent on various parts of the road, and in the case of the culverts, these monies were authorized by and consented to by the provincial Crown, the owner of the road, Mountain Road is a section 4 road.

Parenthetically, I would note that even if I may be wrong in suggesting that Mountain Road is a section 4 road, it appears to me that it is a public road by virtue of section 2 of the Highway Act; the road, being on Crown land, is clearly not a private road. It therefore appears to me that the Approving Officer's decision to reject Mr. Farup's subdivision application on the ground that there was no public road access was based upon a mistake of law.

B. Issues Concerning Administrative Fairness and Section 4

I may also conclude that the decisions in the case of each of these complainants were "made . . . pursuant to a statutory provision . . . that is unjust, oppressive or improperly discriminatory" (section 22(1)(a)(iii) of the Ombudsman Act).

As has been seen earlier in this letter, section 4 was originally enacted to apply to travelled roads in existence prior to 1905. Presumably, at that time, there were many roads which were used by the public and maintained with public funds, but which had not yet been gazetted or otherwise registered in the name of the Crown. Consequently, the enactment of this section immediately transferred title in such roads to the Crown, and thus prevented anyone from obstructing those roads or otherwise using them for private purposes.

I would surmise that a time limit was put on the applicability of the section as it was assumed that the Department of Highways would undertake to properly survey and register all public roads, and that in time the section would no longer be necessary. As has been seen, the time limit was extended three times by the Legislative Assembly until, in 1945, the time limit was repealed.

There are primarily two methods by which a road becomes a public road. The most common one is by dedication. Whenever, a person subdivides his land, the Approving Officer (an employee of the Ministry outside of municipalities) may require, as a condition of approval, that land be dedicated to the Crown where he believes it is necessary for future road construction. In these cases, the owner receives no compensation; if he wants his subdivision, he must be prepared to give part of his land to the Crown.

The other method is by direct purchase or expropriation by the Crown. In these cases, compensation is paid to the owner, or if compensation cannot be agreed upon, it may be determined by binding arbitration.

Both of these methods provide procedural safeguards for the property owner. If a subdivider believes that the demands for road dedication by the Approving Officer are unreasonable, he may appeal to the Supreme Court. In the case of direct acquisition, the property owner may simply

refuse to sell, thus forcing the Ministry to expropriate. A notice of expropriation must be signed by the Minister who is accountable to the Legislative Assembly.

However in the case of expropriations under section 4, no such procedural safeguards exist. By virtue of the road having been graded or a culvert installed, the title to the land covered by the road immediately passes to the Crown. This arbitrary procedure has the potential to be used for improper purposes and can result in unexpected consequences. In Mr. Smith's case, when Mr. Smith objected to the Ministry's claim that the road was public, the Ministry sent a grader down to grade the road. Mr. Smith, however, had been tipped off and he turned back the grader at his gate. In the case of Mountain Road, the Ministry quite clearly does not consider it in the public interest to expend substantial sums of money in providing public access to the southern end of Saltspring Island. However, because of section 4, the Ministry may have no choice; the installation of the culverts may have resulted in there being a public road in that location, for which the Ministry must assume responsibility.

Section 1 of the Canadian Bill of Rights provides for:

> the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; . . . .

In these cases not only may a person be deprived of his property without due process, but sometimes no process is entered into at all: the fact of a Ministry employee grading a private road can result in the instantaneous and compulsory transfer of the ownership in the road to the Crown.

It appears to me that section 4 of the Highway Act may be unjust, oppressive and improperly discriminatory. It may be <u>unjust</u> because it results in land being taken from citizens, by force of law, without compensation. In Mr. Smith's case, Ministry officials adamantly refused to pay any compensation to him for the road because they claimed that they already owned it because of section 4.

Section 4 may be <u>oppressive</u> because it results in property being taken from persons without their knowledge or consent. While the Courts have required that section 4 only apply where public monies were spent with the knowledge or consent of the property owner, I doubt if many of these people would have consented had they known that as soon as the grader came on the road or a culvert was installed, the ownership of the road was immediately transferred to the Crown.

Section 4 may be <u>improperly discriminatory</u> because its application is arbitrary and inconsistent. Section 4 results in the transfer of ownership in land in some cases where neither the Ministry nor the property owner intended such an effect; this is arbitrariness at its worst. Inconsistency of application is best seen between Mr. Smith's

case, where the Ministry's claim is based solely upon the statement of a Ministry employee that he graded the road a few times, and the case of Mr. I. Kelly of Rock Creek which I investigated in the early part of 1981. Mr. Kelly asserted that a road across his neighbour's land was a section 4 road and supported his claim by a document signed by seven former Ministry employees attesting that they had worked on the road. Nevertheless, Mr. W. Sproul, the Regional Engineer, would not agree that this work had resulted in the road becoming a section 4 road, and stated:

> To establish the road as Section 4 over the objections of Mr. Kelly's neighbours would likely involve court action and it is my experience that the courts would not likely accept the employee affadavits without proof of authorization and proof of funds expended.

If Mr. Sproul was correct (and I agreed with him and concluded that Mr. Kelly's complaint was not substantiated), it appears to me inconsistent for the Ministry to claim that the testimony of its grader operator, unsupported by any records, is sufficient to establish that the road through Mr. Smith's property is a section 4 road.

There are other equally serious consequences of section 4 and its use and application by the Ministry. I discuss these below:

1. Land Registry Problems Section 4 creates confusion in our land registry system. When a person obtains a Certificate of Indefeasible Title, he has the right to presume that he owns all of the land described in that document. However, section 23 of the Land Title Act provides for some exceptions to this, and these exceptions are clearly stated. Nevertheless, a person or his lawyer, searching the title, will be able to determine what exceptions apply in each case -- except for section 4 roads.

Section 4 roads are not registered, as are other public highways, in the Land Title Office. In fact, no one really knows until it has been determined by the Court whether or not a particular road is or is not a section 4 road. Take Mr. Smith's case. He purchased the property in 1974 and was informed by the previous owner that the road through the property was private, having been constructed with private monies in 1967. No mention of the road existed in the Land Title Office. Some years later, when he attempted to restrict the use of his property by others, the Ministry claimed that, in fact, the Crown owned the road. Not surprisingly, since the road has never been registered in the Land Title Office, Mr. Smith has always paid the taxes on it.

The problems created by section 4 in the land registry system are discussed in a paper written by Mr. T. W. Carlow, Registrar of Land Titles in New Westminster, entitled "The Creation of Public Roads". Looking at the problem from the point of view of a municipality, Mr. Carlow wrote:

> The District of Mission is not alone in its problem, every Municipality has it. What causes it to arise is the failure of Municipalities over the years to follow up on their by-laws by

> acquiring title to the land over which the highway is created by the expenditure of public moneys. As a result, instead of the municipality owning title to the highways, title vests in Her Majesty under section 6 [now section 4] of the Highways Act. Nor does the registered owner own the land included in the highway, it has become a travelled road and his title is, under section 38 of the Land Registry Act [now section 23 of the Land Title Act] subject to public highways. What actually causes claims is registered owners discovering on search at the Land Registry Office that the boundaries of their parcel of land are greater than what they occupy and they conclude, in their own minds, that the Municipality has trespassed on their lands and want compensation. In nearly every case the current registered owner is not the person from whom the lands were taken and the highway established before he acquired title which entitles him to nothing because of said section 38 and section 6 of the Highways Act. The failure of the Municipality to complete documentation with the owner at the time the lands were taken leaves many hundreds of legal descriptions incomplete in the Land Registry Office and misleads these registered owners.

I would paraphrase that last sentence to say that the failure of the Ministry to complete documentation with the owner at the time the lands were taken leaves many thousands of legal descriptions in British Columbia incomplete in the Land Titles Offices and misleads the registered owners.

2. Disputes Between Neighbours Every year there are cases in which, because of a dispute, one neighbour cuts off the use of a road traversing his property by another neighbour. The latter will then appeal to the Ministry and may argue that the road is a public road because of section 4. Although the Ministry's Policy Manual provides in section 4.36 that it is not the policy of the Ministry to intervene in such cases, it frequently does. In both of the cases involving the Pimentels and the Vans, and Mr. Smith and the residents of Red Granite Point, the Ministry intervened to assert that the road in question was public because of section 4. In the Pimentel case, the Pimentels took the matter to Court and obtained a declaration indicating that the Ministry was wrong in asserting that the road was a section 4 road. Had the Ministry not advised the Vans and the other residents in Shuswap Beach Estates that the road was a public road, I would have probably concluded that the Ministry had no obligation to provide them with public road access as their titles indicated water access only. However, these people relied upon the Ministry's statement that there was public road access and it seems to me that the Ministry, through its own mistake of law, has now a moral obligation to provide it.

In Mr. Smith's case, instead of permitting the residents to go to Court if they were unable to resolve the dispute among themselves, the Ministry intervened and asserted that the road was a section 4 road on the skimpiest of evidence. In the face of Mr. Smith's obstinance, the Ministry increased its original offer of roughly $33,000, for the

right-of-way enclosing the road, to one of $58,000 before Mr. Smith finally agreed to sell. This action was taken by the Ministry notwithstanding the fact that the residents of Red Granite Point had purchased their properties on the basis of water access only. Unfortunately, the status of the travelled road still remains undetermined - - the Ministry only purchased the right-of-way adjacent to that road.

It seems to me that, in these cases, section 4 results in confusing the status of the road, which results in disputes and friction between neighbours, and the Ministry finds itself drawn into these disputes. If section 4 was not in existence, the Ministry could create a public road where it thought it necessary for the public interest. Where the creation of a public road was not in the public interest, the neighbours would have to work it out among themselves, by one selling an easement or right-of-way to the other.

PROPOSED RECOMMENDATIONS

It is my preliminary view that section 4 of the Highway Act should be reconsidered. I may recommend that the Ministry recommend legislative change to amend section 4 as follows:

First, that section 4 be limited to apply to roads upon which public money has been expended prior January 1, 1982. Second, that section 4 be amended to provide that it shall be without effect as of January 1, 1987. Thus the Ministry would have roughly five years to properly gazette and register its title to all roads which are public because of the operation of section 4. As of 1987, purchasers of property could be assured that they can obtain from the Land Titles Office a correct description of the property they are acquiring. Similarly, as of 1982, the Ministry will only be able to acquire roads by way of dedication, acquisition or expropriation, and members of the public will be protected by the safeguards, though minimal, which go along with each of those processes.

I may also recommend that corrective action be taken with respect to the complaints of Mssrs. Smith, Newton, and Farup, if I conclude that the Ministry's decisions in these cases were based upon a mistake of law.

I would invite your comments on the above prior to my reaching a decision on these matters. If you do wish to comment, may I receive your response in my office within four weeks of the date of this letter. If my office may assist in providing further information or if you wish to discuss this matter before responding, please contact my investigator, Rick Cooper.

Thank you for your assistance and cooperation.

Yours sincerely,

K. A. Friedmann

Karl A. Friedmann
Ombudsman

Province of
British Columbia

OFFICE OF THE
DEPUTY MINISTER

Ministry of
Transportation
and Highways

940 Blanshard Street
Victoria
British Columbia
V8W 3E6
Phone 387-3280

YOUR FILE:

OUR FILE 70-02-51/343688

April 6, 1982

Dr. Karl A. Friedmann
Ombudsman
8 Bastion Square
Victoria, British Columbia
V8W 1H9

Dear Dr. Friedmann:

Re: Section 4 of the Highway Act;

Mr. Rankin Smith
Cortez Bay Marina Corporation
Cortez Island, B.C.

Mr. Robert J. Newton
Farmington, B.C.

Mr. Thomas Farup
Ganges, B.C.

I have received with thanks your letter of March 30, 1982 with respect to the above complainants and Section 4 of the Highway Act.

It is our definite intention to comment on your proposed recommendations, however such may be delayed pending a complete review by our legal counsel.

You may expect a reply as soon as we receive legal advice in this matter.

Yours very truly,

A. E. Rhodes
Assistant Deputy Minister

AER/wlc

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Section 4 of the Highway Act;

Mr. Rankin Smith
Cortez Bay Marina Corporation
Cortez Island, B. C.

Mr. Robert J. Newton
Farmington, B. C.

Mr. Thomas Farup
Ganges, B. C.

You will recall that I wrote to you on March 30, 1982, pursuant to section 16 of the Ombudsman Act, concerning the complaints I had received from the above-captioned persons. In that letter I asked that if you wished to comment on my preliminary findings, that I receive you response withing four weeks of the date of that letter. You wrote to me on April 6, 1982, to advise that you intended to reply, but I have received no further response from you to date. I have now decided these complaints and I am writing to report to you my opinions and to make recommendations.

I have concluded that these complaints are substantiated on the following grounds:

A. It is my belief that the decisions of your Ministry concerning the status of the roads in question in each of these complaints were based upon mistakes of law. My reasons for these conclusions are set out in my letter to you of March 30, 1982.

. . . 2

B. It is my belief that the decisions of your Ministry concerning the status of the roads in question in each of the complaints were made pursuant to a statutory provision which is unjust, oppressive, and improperly discriminatory. I refer of course to section 4 of the Highway Act, and my reasons for these conclusions are set out in my letter to you of March 30, 1982.

On these grounds, I make the following recommendations:

I. RESOLUTIONS FOR THE COMPLAINTS

Re Mr. Smith's complaint:

I understand that your Ministry has now gazetted the travelled road through Mr. Smith's property. This, of course, amounts to an expropriation of his property if, as I have concluded, the travelled road was not previously made a public road. I therefore recommend:

RECOMMENDATION #1

That the Ministry of Transportation and Highways pay compensation for the property expropriated from Mr. Smith (actually from Cortez Bay Marina Corporation, of which Mr. Smith is the owner) as required by the Highway Act.

I would expect that this would include both compensation for improvements to the road and compensation for damages resulting from the severance of his commercial property. You will recall that your Ministry refused to pay severance damages at the time of purchasing the right-of-way from Mr. Smith because of its assertion that there was already a public road severing the property.

Re Mr. Newton's complaint:

RECOMMENDATION #2

That the Ministry of Transportation and Highways advise Mr. Newton that the road traversing his property is considered to be a private road, or alternatively, if the road is considered to be necessary in the public interest, that the Ministry expropriate the road from Mr. Newton and pay compensation to him for it.

. . . 3

Re Mr. Farup's complaint:

RECOMMENDATION #3

That the Ministry of Transportation and Highways not decline to approve Mr. Farup's proposed subdivision on the ground that there is no public road access to his property, and that he be informed of this in writing.

II. SECTION 4 OF THE HIGHWAY ACT

RECOMMENDATION #4

That your Ministry reconsider section 4 of the Highway Act with a view to amending it so that it shall become void and without effect as of June 1, 1987 and that title to all roads previously established as public by section 4 (or the predecessors of that section), and not subsequently gazetted, shall revert to the owners of the properties through which such roads traverse.

RECOMMENDATION #5

That during the years prior to June 1, 1987, your Ministry undertake to determine which roads, currently public under section 4, are necessary to serve the public interest and to legally survey and gazette such roads, and to file notice of such gazettings in the respective Land Title Offices and with the present owners of the properties through which such roads traverse.

RECOMMENDATION #6

That prior to any road being gazetted pursuant to Recommendation #5, your Ministry obtain a legal opinion as to whether or not the road in question is public according to the judicial interpretation of section 4, and that only roads which it is believed would be found by a court to be public pursuant to section 4 be gazetted pursuant to Recommendation #5.

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RECOMMENDATION #7

That District Highways Managers be instructed to inform all persons, who, to their knowledge, use roads which are now public under section 4 to obtain access to their properties, of the legislative change contemplated in Recommendation #3, and invite them to make submissions to your Ministry as to why such roads are necessary in the public interest and should therefore be gazetted by your Ministry.

I would request that you inform me within four weeks of the date of this letter of the steps which have been taken, or are proposed to be taken, to implement these recommendations, pursuant to section 23 of the Ombudsman Act. If no steps have been taken or are proposed to be taken, I would request that you inform me of the reasons within the same time period. If you require an extension to this time frame, please contact me.

If you wish to discuss my recommendations or to suggest modifications to them prior to replying, I would be happy to meet with you for that purpose. Thank you for your cooperation and assistance, and I look forward to hearing from you.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Province of
British Columbia

OFFICE OF THE
DEPUTY MINISTER

Ministry of
Transportation
and Highways

940 Blanshard Street
Victoria
British Columbia
V8W 3E6
Phone 387-3280

YOUR FILE:

OUR FILE 70-02-51

May 21, 1982

Dr. Karl A. Friedmann
Ombudsman
8 Bastion Square
Victoria, British Columbia
V8W 1H9

Dear Dr. Friedmann:

Re: Section 4 of the Highway Act;

Mr. Rankin Smith
Cortez Bay Marina Corporation
Cortez Island, B.C.

Mr. Robert J. Newton
Farmington, B.C.

Mr. Thomas Farup
Ganges, B.C.

Thank you for your memorandum of May 20, 1982 in which you detail your decisions and recommendations with respect to the above complaints.

Firstly, I apologize for the delay in replying to your previous memorandum of March 30, 1982, however, it has taken several weeks to identify the magnitude of the task that would be imposed should we consider your previous recommendations. The six Regional Directors have just now completed the assignment of identifying Section 4 roads throughout the province, and for your information such are 16 704 kilometres in length and comprise 38% of the total road system of 43 853 kilometres.

The general recommendations as contained in your letter of March 30, 1982 were included on the Highway Board agenda of May 20, 1982 and while the Board is not at this time prepared to recommend acceptance, it is recognized that there is a need for more consistency in dealing with roads created pursuant to Section 4. A policy will be developed for recommendation to the Minister at an early date.

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Dr. Karl A. Friedmann
Ombudsman

May 21, 1982

Your specific recommendations with respect to the individual complaints as referred to in your memorandum of May 20, 1982 will be discussed with our legal officers and you may expect to receive a reply within the time frame specified.

Yours very truly,

A. E. Rhodes
Assistant Deputy Minister

AER/wlc

Province of
British Columbia

OFFICE OF THE
DEPUTY MINISTER

Ministry of
Transportation
and Highways

940 Blanshard Street
Victoria
British Columbia
V8W 3E6
Phone 387-3280

YOUR FILE:

OUR FILE 70-02-51

July 8th, 1982.

Dr. Karl A. Friedmann,
Ombudsman,
8 Bastion Square,
Victoria, B. C.
V8W 1H9

Attention: Mr. Rick Cooper

Dear Sir:

Re: Mr. Rankin Smith, Cortez Island
Mr. R. J. Newton, Farmington
Mr. T. Farup, Ganges
Section 4 of the Highway Act

I refer to our recent telephone discussion with respect to the above complainants.

Mr. Rankin Smith - Compensation has been established for the widened right-of-way to the mutual satisfaction of Mr. Smith and the Ministry and the amount agreed upon has now been paid. It is not our intention to offer further compensation for the section 4 road that existed prior to our negotiations.

Mr. Robert Newton - Correspondence discloses that the loop in question was constructed in 1970/71 to avoid a cut and fill situation in unstable clay soil. In 1980, it was explained to Mr. Newton that closure of the road as requested was not possible as there were regular users, that the road was in continuous use for approximately ten years and that public funds were spent on both summer and winter maintenance. Relocation of the road would be extremely costly.

This was reiterated to Mr. Newton in a letter from the Minister dated October 28th, 1980.

As to the understanding with respect to the temporary nature of the loop, an attempt has been made to locate any information, however, we have met with little or no success. According to a vague rumour, Mr. Fred Dayus, now disabled and retired for quite a number of years, may have commented that the loop would be a temporary arrangement, however, this cannot be confirmed.

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Dr. Karl A. Friedmann July 8th, 1982.

Mr. Thomas Farup - This matter is presently before the Courts and comment at this time would be inappropriate.

As further requested, I am pleased to attach for your information, a copy of our Circular Letter G8/82 with respect to Section 2 and Section 4 Roads and I trust that these instructions will result in a more consistent approach in determining the status of such roads in future.

Yours very truly,

A. E. Rhodes,
Asst. Deputy Minister.

AER/CW
Encl.

Ministry of Transportation and Highways
940 Blanshard Street
Victoria, British Columbia
V8W 3E6

Circular Letter: G8/82

Date: May 25, 1982

File: 70-00-11

TO: All Assistant Deputy Ministers
All Executive Directors
All Branch Heads
All Regional Directors, Highways
All District Officials
Superintendent of Motor Vehicles
Superintendent of Motor Carriers

Re: Section 2 and Section 4 Roads

Recent legal actions indicate that the courts are requiring evidence of proof of section 2 and section 4 roads in excess of what most of our officials believe is necessary. As a consequence of the inability to supply the evidence required some roads we thought to be section 2 or section 4 turn out to be private roads in fact.

For section 2 roads the evidence appears to be to require the usual documentary evidence of exception of existing roads in the Crown Grant and, in addition, some evidence that the road in dispute is in the exact location described in the Crown Grant (if described) or that it has existed in its present location since before the Crown Grant. You will appreciate that, particularly with Crown Grants older than about 30 years, this last item can be very difficult to prove. Persons enquiring whether a road is section 2 should be told the Ministry has no position on the question and that if the person wants to pursue it further by enquiring of Lands, court action or whatever, the Ministry will cooperate by provision of any documentation in its possession.

For section 4 roads even more evidence is required. Proof is usually required that:

1. funds were expended on the road
2. the funds were expended in some reasonable distribution over the whole route in dispute
3. the funds were expended lawfully, i.e., authorized to be expended by some reasonably senior official (probably at least District Highway Manager)

... 2

4. the expenditure was with the express or implied consent of the landowners (implied meaning that at the very least they knew it was going in and did not object)

5. the present road is indeed exactly the same one, without deviation or revision, on which the funds were spent

6. the road was travelled by vehicles before the maintenance expenditure, i.e., at least wagons (horse riders, driven cattle, etc., are not vehicles), and that the travel was by a wider public than just that associated with access to the affected properties, i.e., a measure (at least) of "through" travel

7. if the expenditure was after April 5, 1968, it was on work other than plowing or ice control.

By and large these proofs should not be too difficult on regularly maintained section 4 roads and indeed for that very reason disputes are less likely to arise. However, for those roads maintained infrequently or not maintained at all for several years, these proofs can be very difficult and in these cases District Highway Managers should be very careful to check before advising persons enquiring whether a road is section 4. The former practise of quickly checking the Road Register is not enough. In these cases the District Highway Manager should carefully consider the facts (and in some cases have research undertaken) before taking the position that a road is section 4 or before saying that in his opinion it is section 4. The District Highway Manager should not delegate this. Other officials can of course receive information over the counter, telephone, etc., but should not express an opinion to the enquirer until instructed by the District Highway Manager. Where any doubt exists the District Highway Manager can refer to Region or Headquarters via Region for advice.

Please note that both section 2 and section 4 refer to roads and not trails. While a trail may have some status by exception in the Crown Grant section 2 does not operate to declare it public. A trail maintained by public funds does not become public by section 4. (If widened, etc., to carry vehicles it can then be a section 4 road. Proofs of expenditure, etc., must then postdate its use by vehicles.)

Please note also that public roads not dedicated by a subdivision plan deposited between March 24, 1949 and March 27, 1961 (inclusive) were extinguished by the deposition of the subdivision plan. A road so extinguished can be section 4 still but all the proofs will again have to postdate the subdivision plan, i.e., the road is reestablished section 4 again after the subdivision.

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Persons told by any official or member of the Ministry, including maintenance workers, that a road is public will rely on that statement and make decisions and expenditures accordingly, including purchase of home site, subdivision, installation of power lines, etc.

R. G. Harvey, P. Eng.
Deputy Minister

Province of
British Columbia

OFFICE OF THE MINISTER

Ministry of
Transportation
and Highways

Parliament Buildings
Victoria
British Columbia
V8V 1X4

- 70 -

Minister's phone:
387-3180 or 387-3181

Executive Assistants:
387-6046 or 387-6709

RECEIVED
MAY 30 1984
VICTORIA

May 24, 1984

Dr. Karl A. Friedmann,
Ombudsman,
8 Bastion Square,
Victoria, B.C.
V8W 1H9

Dear Dr. Friedmann:

The report concerning your investigation into the complaints of Messrs. Smith, Newton and Farup, transmitted by letter dated October 17, 1983, addressed to the Honourable W.R. Bennett, Premier, Chairman of the Executive Council, has been received and considered by the Lieutenant Governor in Council.

The decision of the Executive Council with respect to each of the first three recommendations in that report is as follows:

1. Recommendation #1. An agreement was negotiated with Mr. Smith. Mr. Smith agreed in written form to accept compensation in the sum of $58,000 for his land to be used as a right of way for highway purposes and for all damage to his remaining land including settlement of all claims, demands or damages arising out of or connected with the taking of the land for that right of way. That agreement completes the matter.

2. Recommendation #2. The Ministry of Transportation and Highways has arranged to negotiate with Mr. Newton with a view to making an offer of compensation for the required right of way, in place of using the resumptive powers. These proceedings are underway and hopefully will result in a satisfactory solution.

3. Recommendation #3. Officials of the Ministry of Transportation and Highways are of the view that the culverts were supplied to be installed on the public section of the road; whereas Mr. Farup says that the Ministry agreed to the locations of the culvert as installed. A resolution of these divergent positions seems difficult to achieve but the practical answer is that even if these differences were resolved in favour of Mr. Farup, his property still would not have the required public access since other parts of the disputed road are not located on the gazette line and it passes through ecological reserve and other private property.

CC KAF
84-05-31

The policy initiative contained in the Ministry of Transportation and Highways Circular Letter G8/82 dated May 25, 1982, should alleviate any ambiguity or uncertainty in the future about whether a particular road has become a public highway by operation of Section 4 of the Highway Act.

With reference to recommendations 4 through 7 in your Report, I would mention that the cost of legally surveying and gazetting all 16,704 kilometers of Section 4 road within the province by June 1, 1987, as well as settling all differences with respect to such roads either within or even without that time frame, would be prohibitively expensive. It is certainly not open to the Government of the Province of British Columbia in acting in the public interest, to at this time divert funds from worthwhile and needed programs of a social and other nature in order to implement your general recommendations concerning Section 4 of the Highway Act.

May I, on behalf of the Executive Council, express my appreciation to you for bringing these matters to our attention.

Yours very truly,

Alex V. Fraser
Minister

The above three statutes authorize the interference with private property in the public interest without the payment of compensation. The destruction of a crop under the *Noxious Weeds Act* might cause considerable financial loss to its owner.

Similar provisions are contained in the *Health Act*[40] and *Municipal Act*[41] authorizing the removal of hazards to public health or safety, and in the *Fire Marshal Act*[42] in respect of fire hazards.

These are all special situations. While there should be adequate safeguards on the exercise of the above statutory provisions, compensation would not appear to be justifiable in cases where the powers are being properly exercised.

Furthermore, these are not situations where property is being compulsorily taken for the use of another person.

Accordingly, the Commission recommends:

The general expropriation statute later recommended should not apply to

(1) *the* Noxious Weeds Act;

(2) *the* Plant Protection Act; *or*

(3) *the* Grasshopper-control Act.

The submission made on behalf of the Civil Liberties Association stated that, where damage was caused to the owners of land by government agencies under these statutes, the question of compensation should be governed by the general statute we propose. It may be that the general arbitration tribunal would be a suitable body for dealing with damage claims under the three statutes, and similar enactments. But, as we have already pointed out, we do not think that compensation would be justifiable in cases where the powers are being properly exercised. Thus, valid claims could only be made where the intervening body or person exceeded his statutory authority. We have suggested that there should be adequate safeguards in the exercise of that authority, but we believe that a consideration of what those safeguards should be, in reference to each of the statutory provisions referred to, is outside the scope of this Report. Until such time as those various provisions are reviewed, we would prefer to leave jurisdiction in these matters to the Courts.

G. *Highway Act*

There are several special situations in relation to highways.

1. *Crown reservation for road allowance*

Most, but not all, Crown grants of lands have reserved to the Crown the right to take back up to one-twentieth of the lands so granted for public roads and other works of public utility. No restrictions were generally contained in the reservation as to the location of the roads, except that the reservation did not apply to lands on which buildings were erected or were in use as gardens or otherwise for the more convenient occupation of such buildings. Nor was the Crown obligated to pay any compensation for the land when it exercised this right. Thus, where the reservation exists, the Crown is in a position to take up to one-twentieth of the lands granted when and where, subject to the above exception, it wishes; and without the payment of compensation. While the absence of liability for compensation is due to the reservation in the Crown grant, it is supported by section 16 (1) (*b*) of the *Highway Act*, which ex-

[40] R.S.B.C. 1960, c. 170, ss. 6, 8, 12, 74, *et seq.*
[41] R.S.B.C. 1960, c. 255, s. 873. [42] R.S.B.C. 1960, c. 148, s. 17.

pressly provides that compensation shall be in respect of lands only to the extent that the one-twentieth reservation is exceeded.

Where the Crown has reserved such a right, it would seem, at first glance, that the landowner should not complain if that right is exercised in a fair and reasonable manner. Such exercise cannot be regarded as an expropriation. However, the Commission believes that certain of the procedural safeguards later proposed as appropriate for expropriations generally should apply, such as those dealing with notice and the inquiry procedure.

Accordingly, the Commission recommends:

Where the Crown proposes to exercise a reserved right to take back up to one-twentieth of Crown-granted land for a public road or other works of public utility,

(1) *notice of its intention to do so should be given in the same way as a notice of intention to expropriate;*

(2) *the owners of interests in the land from which the allowance is to be taken should be entitled to invoke the general inquiry procedure later proposed; and*

(3) *the general approval procedure later proposed should be applicable, and the approving authority for this purpose should be the Minister of Highways.*

The general compensation provisions would not be applicable.

It has, however, been suggested to the Commission that consideration should be given to the question whether the practice of including the reservation, and other similar reservations giving a right to take without compensation (e.g., to enter and take gravel), should be discontinued for the future, and existing rights or powers of this sort be waived.

The Commission has given considerable thought to this problem. There is no question but that the law should set its face clearly and consistently against the possibility of any compulsory taking of another's property without payment of compensation therefor. However, there is equally no question that what is being done in these cases is the exercise of a right to resume possession, which right was reserved in the original grant and is clearly covered in the *Land Registry Act*, which is the basic statute in this Province dealing with title to land.

It is true that when the right is exercised, the effect is to dispossess the owner; however, it is equally correct to say that what is done is not, strictly speaking, an expropriation but a resumption of title, the right to which was clearly stated when the Crown originally parted with title.

On this question the Commission has, with some regret, concluded that it would not be right at this time to make a positive recommendation. The Commission did not receive any widespread comment on this matter, although we did receive reasoned, and opposing, views from the Department of Highways and the Council of the Forest Industries of British Columbia. A recommendation should only be made, we feel, after considerable further study and discussion, including such questions as who is likely to be affected, the cost to the public of dropping the reservation, whether the reservation (if it is to be continued) should be clearly and specifically endorsed as a charge on the title, and related problems.

We believe the question should be considered as a matter of policy, but it is not an essential part of a study dealing with expropriation. The Commission would be willing to give the matter further consideration in a separate report.

2. *Section 6 highways*

Sections 6 and 7 of the *Highway Act* provide:

> 6. (1) Where public money has been expended on a travelled road that has not been theretofore established by notice in the Gazette or otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the district in which the road is situate, that travelled road shall be deemed and is declared to be a public highway.
>
> (2) This section does not apply where the expenditure of public money is confined to expenditure in respect of snow-ploughing and ice control or either of them.
>
> 7. Any public highway declared to be a public highway by section 6 that has not a width of at least thirty-three feet on each side of the mean centre line of the travelled road may be enlarged to that width when deemed necessary by the Minister.

It would appear, therefore, that for a public highway to come into existence under section 6, two conditions must exist—

(1) An expenditure of public money on an already existing road; and

(2) That road must be a "travelled" road.

The statute does not say by *whom* the road must be "travelled" or how frequently. "Travelled," we understand, is taken in practice by the Department of Highways to involve use by the public.[43]

The Department of Highways can, in theory, by the simple expedient of running a grader, or spreading gravel, along an existing "travelled" private road (against the wishes of the owner or without his knowledge) turn the private road into a public highway. There is some doubt as to how far the Department could go in acquiring lands in this way. Does section 6 apply, for example, where public moneys are expended to clear the brush alongside the edge of the road?

The turning of a private road into a public highway in this manner will only call for the payment of compensation if the land taken exceeds in area the Crown reservation for a road allowance, so far as the land taken is concerned. Compensation, however, is apparently paid for the improvement represented by the road.

Whether or not an expropriation occurs in the declaring of a public highway under section 6, the provision is a thoroughly objectionable one from the point of view of the landowner. In addition, a very serious problem can exist with section 6 public highways with respect to the operation of the land registration system. There will be usually no indication in the Land Registry Office records that the road exists as a public highway, since no survey will have generally been made. This is a very unsatisfactory situation so far as persons dealing with the land are concerned. Even if it becomes known that the road is a public one, the road's location, in relation to the existing surveys of the relevant land, is unascertained. Also, the width of the road may be a matter of doubt.

When section 6 was first enacted in 1905,[44] it may well have served a useful purpose in areas where there was a shortage of surveyors. Today, however, when the Department of Highways has adequate and mobile survey facilities, there can be little, if any, justification for the retention of section 6, except in so far as providing statutory support for highways that have already

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[43] This practice is based on the unreported decision, in 1963, of Harvey, *C.C.J.*, in *Schaub v. Quality Spruce Mills Ltd.* County Court Registry, Smithers; File 10/63.

[44] *Highways Establishment and Protection Act, 1905*, S.B.C. 1905, c. 26, s. 2.

come into existence under it. We understand that the Department prefers not to rely on section 6, and, in practice, will generally proceed under section 8 where public moneys have been expended on a travelled road.

Accordingly, the Commission recommends:

Section 6 should be amended to restrict its application to public highways deemed and declared to be in existence at the time of the amendment.

The Department of Highways has indicated to us that it is in agreement with this proposal. The Branch of another Government department, however, stated that section 6 has been useful in the past in providing access to recreation areas, where the process of surveying and recording has not kept pace with improvements to private roads. Until there was some assurance of immediate access to publicly served roads, that Branch felt it would be "reluctant to encourage repeal or amendment." We would point out that our proposed treatment of section 6 is prospective only. We would reiterate again that, for the future, section 6 does not in our view provide an appropriate means of creating highways.

The Commission hopes and feels sure that in time all public highways now existing by virtue of section 6 will be properly surveyed by the Department and that the surveys will be registered in the appropriate Land Registry Offices. We recognize that this will be a very gradual process.

3. *Gazetted highways*

Under section 8 of the *Highway Act*, the Minister of Highways may, in his absolute discretion, make public highways of any width and "declare the same by a notice in the *Gazette* setting forth the direction and extent of such highway." For such a purpose lands may be entered and taken possession of by the Minister, or persons acting on his authority, without the consent of the owner of the lands. Such entry operates to extinguish title to the land.

Under *Land Registry Act* regulations,[45] the Minister *may* cause a notice of the exercise of the above powers (and also those exercised under the *Department of Highways Act*), in respect of land for which a certificate of title has been issued, to be presented for filing to the appropriate Registrar of Titles. The notice states that "the lands herein described have been acquired by Her Majesty the Queen in right of the Province of British Columbia." The statutory authority, the *Gazette* reference, and a description of the land taken is then required to be set out in the notice. Attached to the notice there is required to be a sketch or plan outlining the land affected. The Registrar is required to make a notation of the notice on the relevant certificate of title. The regulations state that such filing and notation of a notice is evidence only of the exercise of the Minister's powers and that the absence of such a notation does not "imply" that land is not affected by the exercise of such powers. Even where there is a notation the regulation provides that such notation does not "imply that land described in the certificate is not affected by any other exercise of the Minister's powers."

Generally, the description of lands in the *Gazette* and under the notice in the *Land Registry Act* are based on engineering surveys, which may be adequate for the purpose of constructing highways but which are not up to the standards required for land registration purposes established under the *Land Registry Act*.

The above procedures create a number of difficulties.

[45] B.C. Reg. 171/68, made pursuant to s. 258 (1) (e) of the Act.

(*a*) *Entry*

The shift in title appears to depend on "entry" for the purpose of taking possession of lands. Section 9 of the *Highway Act* states that the entry by the Minister for the purpose of taking possession of the lands operates to extinguish title. We understand, however, that it has been argued that the date of publication in the *Gazette* is the date of expropriation. If the "entry" criterion is correct, there are a number of problems which result—

1. There may be some difficulty in determining what constitutes "entry" for that purpose. It would be preferable if the state of the title did not depend on some physical occurrence on the land but rather on the filing or service of some document.

2. There may be occasions when the Minister has made his declaration in the *Gazette*, but there has been no entry. There may never be an entry and the highway never built. No expropriation can be said to have taken place, title to the land not yet being extiguished. This creates three difficulties—

(*a*) Such a situation puts the landowner in an intolerable position, particularly if he wishes to develop or dispose of his lands, and the position may continue indefinitely.

(*b*) If no notice were filed by the Minister under the *Land Registry Act*, a purchaser of the lands would have no way of knowing that the expropriation process had been started.

(*c*) If a notice is filed by the Minister, the terms of the notice will be in contradiction to the events. The notice states that the Crown has acquired title to the lands, when the Crown has not in fact done so. This appears to mean that the Minister is really not in a position to file notice until there has been an entry under section 9, even though he has published his declaration in the *Gazette* as required by section 8.

(*b*) *Land registration system*

The procedure laid down for filing and notification under the *Land Registry Act* regulations is far from adequate, although it is undoubtedly an improvement over the position prior to 1968, when there was no procedure at all. In a number of respects the procedure works adversely to the purposes of the Province's land registration system. Some of the shortcomings are.

1. The Minister appears to have a discretion to notify the Registrar. There should be a mandatory duty to do so in all cases.

2. The description or sketch of the lands affected, which go with the Minister's notice, are generally based on engineering survey standards, which are usually inadequate for land registration purposes. There should be some requirement that a proper survey be made and filed in the appropriate Land Registry Office within a specified time.

3. The Registrar of Titles has authority now, under section 195A of the *Land Registry Act*, to remove the lands taken for a highway from the relevant certificate of title and to issue a certificate of title for the lands taken, on receiving an application from the Minister of Highways. However, it is not mandatory that such an application should be made where there has been an expropriation by entry under the *Highway Act* and, we understand, the policy of the Department of Highways is not to apply for a certificate of title, except in special circumstances. We are not convinced, it should be mentioned, of the necessity of issuing a certificate of title in the name of the Crown for

the lands taken. We are convinced that the Registrar should indicate on the certificate of title of the former owner that he no longer owns those lands. The Registrar of Titles should be in a position to accept a proper survey as evidence of a conveyance from the owner to the Crown and to amend the title by a proper exception in the description. The transfer of title should depend on the filing of required documents and not on entry under section 9.

The Commission believes that these shortcomings would be overcome if the procedures it proposes in Part Two are implemented.